



This is a digital copy of a book that was preserved for generations on library shelves before it was carefully scanned by Google as part of a project to make the world's books discoverable online.

It has survived long enough for the copyright to expire and the book to enter the public domain. A public domain book is one that was never subject to copyright or whose legal copyright term has expired. Whether a book is in the public domain may vary country to country. Public domain books are our gateways to the past, representing a wealth of history, culture and knowledge that's often difficult to discover.

Marks, notations and other marginalia present in the original volume will appear in this file - a reminder of this book's long journey from the publisher to a library and finally to you.

Usage guidelines

Google is proud to partner with libraries to digitize public domain materials and make them widely accessible. Public domain books belong to the public and we are merely their custodians. Nevertheless, this work is expensive, so in order to keep providing this resource, we have taken steps to prevent abuse by commercial parties, including placing technical restrictions on automated querying.

We also ask that you:

- + *Make non-commercial use of the files* We designed Google Book Search for use by individuals, and we request that you use these files for personal, non-commercial purposes.
- + *Refrain from automated querying* Do not send automated queries of any sort to Google's system: If you are conducting research on machine translation, optical character recognition or other areas where access to a large amount of text is helpful, please contact us. We encourage the use of public domain materials for these purposes and may be able to help.
- + *Maintain attribution* The Google "watermark" you see on each file is essential for informing people about this project and helping them find additional materials through Google Book Search. Please do not remove it.
- + *Keep it legal* Whatever your use, remember that you are responsible for ensuring that what you are doing is legal. Do not assume that just because we believe a book is in the public domain for users in the United States, that the work is also in the public domain for users in other countries. Whether a book is still in copyright varies from country to country, and we can't offer guidance on whether any specific use of any specific book is allowed. Please do not assume that a book's appearance in Google Book Search means it can be used in any manner anywhere in the world. Copyright infringement liability can be quite severe.

About Google Book Search

Google's mission is to organize the world's information and to make it universally accessible and useful. Google Book Search helps readers discover the world's books while helping authors and publishers reach new audiences. You can search through the full text of this book on the web at <http://books.google.com/>



HAWAII REPORTS
VOLUME 25

CASES DECIDED

IN THE

Supreme Court of the Territory of Hawaii

July 1, 1919, to March 23, 1921

PUBLISHED BY AUTHORITY

(Syllabi of the Cases are by the Court)

HONOLULU, T. H.
Honolulu Star-Bulletin, Ltd.
1921

JUL 9 1921

JUSTICES OF THE SUPREME COURT

OF THE

TERRITORY OF HAWAII

DURING THE PERIOD COVERED BY THIS VOLUME.

CHIEF JUSTICE:

JAMES LESLIE COKE,

ASSOCIATE JUSTICES:

SAMUEL BARNETT KEMP,

WILLIAM SEABROOK EDINGS.

ATTORNEY GENERAL

HARRY IRWIN.

CIRCUIT JUDGES

DURING THE PERIOD COVERED BY THIS VOLUME.

FIRST CIRCUIT.

FIRST JUDGE:

CORNELL S. FRANKLIN,

Qualified August 1, 1919.

SECOND JUDGE:

JOHN THOMAS DeBOLT,

THIRD JUDGE:

JAMES J. BANKS,

Qualified September 2, 1919.

SECOND CIRCUIT.

LESLIE L. BURR.

THIRD CIRCUIT.

JAMES WESLEY THOMPSON.

FOURTH CIRCUIT.

CLEMENT K. QUINN.

FIFTH CIRCUIT.

LYLE ALEXANDER DICKEY,

Term expired.

WILLIAM C. ACHI, JR.,

Qualified December 1, 1919.

CASES REPORTED

Achi	Van Giesen v.....	558
Advertiser Pub. Co.....	Kahanamoku v.	701
Aguiar, de	Moranho v.	267
Aguiar, de	Moranho v.	271
Ai	Scott v.	621
Akana v.	Makekau	418
Akana v.	Makekau	593
Akana v.	Makekau	597
Akina	Territory v.	307
Akina	Territory v.	381
Ako	Territory v.	307
Ako	Territory v.	381
Akona v.	Kaluai	392
Allen Estate	Rosenbledt v.	561
Allen & Robinson v.....	Ai	621
Aluli	Kaluhiwa v.	246
American Factors Co., re taxes		769
Amoe (w)	Territory v.	556
Anderson	Territory v.	55
Arnold	Nahaolelua v.	423
Assessor	Frear v.	603
Attorney City and County.	Taylor v.	58
Attorney City and County.	Taylor v.	632
Attorney General	Castle v.	786
Attorney General	Castle v.	807
Attorney General	Castle v.	813
Auditor	County of Hawaii v.....	372
Auditor	Koki v.	406
Auditor	Lord v.	76
Auditor City and County.	Hoomana Naauao v.....	597
Aungst v.	Ai	621

Auto Service & Supply

Co.	Damon v.	98
Azevedo	Territory v.	55
Bailey v.	Gay & Robinson.....	651
Baker v.	Ai	621
Baker	Hoomana Naauao v.....	418
Baker	Hoomana Naauao v.....	593
Baker	Hoomana Naauao v.....	597
Baker	Hurst v.	194
Bank (Sumitomo) v.....	Hawaii Nosan Shokwai...	646
Bank (Sumitomo) v.....	Hawaii Nosan Shokwai...	691
Barnard v.	Nobriga	303
Barnard v.	Nobriga	483
Barques	Territory v.	521
Bayer	Tsuru v.	693
Benson, Smith & Co.....	Rumsey v.	141
Bevins, in re.....		544
Bevins v.	Burr	570
Bicknell	Hoomana Naauao v.....	597
Bishop v.	Reliable Transfer Co.....	98
Bishop & Co. v.....	Reliable Transfer Co.....	98
Bishop of Zeugma.....	Williams v.	588
Board of Dental Exami- ners	Lorigan v.	445
Board of Supervisors.....	Nahaolelua v.	423
Boeynaems	Williams v.	588
Bottomley v.	Reliable Transfer Co.....	98
Bowler	Hoomana Naauao v.	597
Boyd	McCandless v.	22
Boyd	McCandless v.	182
Brandt v.	Kaneakua	51
Brandt	Rosenbledt v.	561
Brandt v.	Wodehouse	561
Bright v.	Makekau	418

CASES REPORTED.

ix.

Bright v. Makekau	593
Bright v. Makekau	597
Brown, Estate of.....	70
Brown, Estate of.....	327
Brown Taylor v.	58
Burr Bevins v.	570
Cabrinha Territory v.	307
Cabrinha Territory v.	381
California Feed Co..... Damon v.	98
Capellas Damon v.	98
Carillo Kahue v.	805
Carter Colburn v.	482
Carter Colburn v.	518
Castanha v. Fitzpatrick	508
Castle Castle v.	786
Castle Castle v.	807
Castle Castle v.	813
Castle v. Irwin	786
Castle v. Irwin	807
Castle v. Irwin	813
Castle McCandless v.	22
Castle McCandless v.	182
Castle, Estate of.....	38
Castle, Estate of.....	108
Castle Estate Scott v.	386
Castle, Will of	786
Castle, Will of	807
Castle, Will of	813
Certiorari, Clerk First Circuit Court	786
Certiorari, Clerk First Circuit Court	807
Chamberlain Rosenbledt v.	561
Chang Chin Hee Fat v.	623

Chang Chip	Hee Fat v.	623
Chee Siu	Territory v.	814
Chillingworth	Yee Hop v.	494
Choy Hoon v.	Young Sak Cho	494
Chun Tin	Hee Fat v.	623
Chun Young Kee v.	Young Sak Cho	494
Circuit Judge	Bevins v.	570
Circuit Judge	Springer v.	638
Circuit Judge	Van Giesen v.	558
City and County v.	H. R. T. & L. Co.	332
City and County	Taylor v.	58
City and County	Taylor v.	632
City and County Attorney.	Taylor v.	58
City and County Attorney.	Taylor v.	632
City and County Auditor.	Hoomana Naauao v.	597
City and County Clerk...	Kumalae v.	1
City and County Clerk...	Kumalae v.	36
City and County Clerk...	Pacheco v.	1
City and County Clerk...	Pacheco v.	36
City and County Mayor...	Nahaolelua v.	423
City and County Treas...	Holt v.	335
City and County Treas...	Taylor v.	58
City and County Treas...	Taylor v.	632
Clark	Lorigan v.	445
Clerk City and County...	Kumalae v.	1
Clerk City and County...	Kumalae v.	36
Clerk City and County...	Pacheco v.	1
Clerk City and County...	Pacheco v.	36
Clerk County of Kauai...	Brandt v.	51
Club Stables	Damon v.	98
Coan	Castle v.	786
Coan	Castle v.	807
Coan	Castle v.	813
Cockburn v.	Reliable Transfer Co.	98
Colburn v.	Carter	482

CASES REPORTED.

xi.

Colburn v.	Carter	518
Colburn v.	U. S. Fidelity & Guar. Co.	479
Colburn v.	U. S. Fidelity & Guar. Co.	536
Com. Public Lands v.	Gay & Robinson	651
Conkling	Holt v.	335
Conkling	Taylor v.	58
Conkling	Taylor v.	632
County Clerk of Kauai.	Brandt v.	51
County of Hawaii v.	Auditor	372
County of Maui v.	Howell	320
C. Q. Yee Hop v.	Nakuina	205
C. Q. Yee Hop v.	Young Sak Cho	494
Crawford v.	Feeley	226
Crawford v.	Feeley	300
Crawford v.	Stewart	226
Crawford v.	Stewart	300
Damon v.	Reliable Transfer Co.	98
Davis v.	Ai	621
De Aguiar	Moranho v.	267
De Aguiar	Moranho v.	271
De Freitas v.	De Freitas	717
De La Nux	Houghtailing v.	438
Dental Examiners	Lorigan v.	445
Diamond v.	Makekau	418
Diamond v.	Makekau	593
Diamond v.	Makekau	597
Dillingham, Estate of.		129
Dykes	Rosenbledt v.	561
Edmunds	Hoomana Naauao v.	418
Edmunds	Hoomana Naauao v.	593
Edmunds	Hoomana Naauao v.	597
Elena	Kaluhiwa v.	246
Estate of Allen.	Rosenbledt v.	561

Estate of Brown.....	70
Estate of Brown.....	327
Estate of Castle.....	38
Estate of Castle.....	108
Estate of Castle.....	786
Estate of Castle.....	807
Estate of Castle.....	813
Estate of Castle..... Scott v.	386
Estate of Damon v..... Reliable Transfer Co.	98
Estate of De Freitas.....	717
Estate of Dillingham.....	129
Estate of Lalakea..... First Bank of Hilo v.....	43
Estate of Liliuokalani.....	127
Estate of Lopez.....	197
Estate of Maguire v..... Ai	621
Estate of Meyer.....	613
Estate of Meyer.....	667
Estate of Parke..... Parke v.	397
Estate of Wilder v..... I.-I. S. N. Co.	178
Farden v. Richardson	611
Feeley	Crawford v. 226
Feeley	Crawford v. 300
Fern	Nahaolelua v. 423
First Bank of Hilo v..... Maguire	43
First Trust Co. of Hilo... Lo v.	185
Fitzpatrick	Castanha v. 508
Fleming v. Ai	621
Fong Koon Chan	Hee Fat v. 623
Fong Yee	Territory v. 309
Foster v. Waiahole Water Co.	726
Franson v. Ai	621
Frear v. Wilder	603
Fujita	Territory v. 762
Fujita	Territory v. 776

CASES REPORTED.

xiii.

Furushio	Territory v.	762
Furushio	Territory v.	776
Galbraith	Haw'n Trust Co. v.	174
Gamaya, in re		414
Gamaya	Territory v.	581
Gay & Robinson.....	Territory v.	651
George	Hoomana Naauao v.	418
George	Hoomana Naauao v.	593
George	Hoomana Naauao v.	597
Gomes v.	Gomes	793
Grand Hotel Co.	Lufkin v.	150
Gray	Kupukaa v.	189
Grossman	Lorigan v.	445
Haaheo	Territory v.	556
Habeas Corpus, Bevins.....		544
Habeas Corpus, Gamaya.....		414
Harrison	Wong Wong v.	92
Harrison	Wong Wong v.	347
Harrison	Wong Wong v.	413
Harrison	Wong Wong v.	739
Hawaii Garage	von Hamm-Young Co. v..	253
Hawaii Nosan Shokwai....	Sumitomo Bank v.	646
Hawaii Nosan Shokwai....	Sumitomo Bank v.	691
Haw'n Pineapple Co. v....	Saito	53
Haw'n Sug. Co.	Tsuru v.	693
Haw'n Trust Co. v.	Galbraith	174
Haw'n Trust Co.	Parke v.	397
Hee Fat v.	Chang Chip	623
Heen	Taylor v.	632
Heine v.	Achi	558
Hilo Bank v.	Maguire	43
Hirota	Territory v.	802
Hitchings v.	Ai	621

Hollinger v.	Kumalae	669
Hollinger	Nahaolelua v.	423
Hollinger v.	Pacheco	669
Holt v.	Conkling	335
Honokaa Sug. Co., re taxes		278
Honolulu Market	Yee Hop v.	494
H. R. T. & L. Co.	City and County v.	332
Honolulu Skating Rink...	Wong Wong v.	92
Honolulu Skating Rink...	Wong Wong v.	347
Honolulu Skating Rink...	Wong Wong v.	413
Honolulu Skating Rink...	Wong Wong v.	739
Hookama v.	Makekau	418
Hookama v.	Makekau	593
Hookama v.	Makekau	597
Hoomana Naauao v.	Makekau	418
Hoomana Naauao v.	Makekau	593
Hoomana Naauao v.	Makekau	597
Hop Wo v.	Young Sak Cho	494
Houghtailing v.	De La Nux	438
Howell	Territory v.	320
Hoy Chong Co. v.	Young Sak Cho	494
Hoy Chun v.	Young Sak Cho	494
Hoy Yuen Co. v.	Young Sak Cho	494
Hurley	Tomishima v.	165
Hurst v.	Kukahi	194
Hutchinson Plantation ..	re taxes	278
Hutchinson Plantation ..	Territory v.	170
Hutchinson Plantation ..	Territory v.	357
Ingvorsen	Hoomana Naauao v.	597
Inheritance Tax Estate of Castle		108
I.-I. S. N. Co.	Kaili v.	777
I.-I. S. N. Co.	Wilder Estate v.	178
Irwin	Castle v.	786
Irwin	Castle v.	807

CASES REPORTED.

xv.

Irwin	Castle v.	813
Iseraela	Hoomana Naauao v.....	418
Iseraela	Hoomana Naauao v.....	593
Iseraela	Hoomana Naauao v.....	597
Jeffreys v.	Konno	465
Jones	Lewers & Cooke v.....	214
Kahanamoku v.	Advertiser Pub. Co.	701
Kahepu v.	King	137
Kahepu v.	King	577
Kahue v.	Palaualelo	805
Kahue	Territory v.	747
Kaili v.	I.-I. S. N. Co.	777
Kaili	O. R. & L. Co. v.....	378
Kaka	Kaluhiwa v.	246
Kakalia v.	Makekau	418
Kakalia v.	Makekau	593
Kakalia v.	Makekau	597
Kalauokalani	Kumalae v.	1
Kalauokalani	Kumalae v.	36
Kalauokalani	Pacheco v.	1
Kalauokalani	Pacheco v.	36
Kaluai	Akona v.	392
Kaluhiwa v.	Miguel	246
Kamaka	Territory v.	556
Kameahaiku	Kaluhiwa v.	246
Kaneakua	Brandt v.	51
Kaneiakala v.	Makekau	418
Kaneiakala v.	Makekau	593
Kaneiakala v.	Makekau	597
Kapana	Akona v.	392
Kapihe v.	Boeynaems	588
Kauhane	Territory v.	307
Kauhane	Territory v.	381

Kawahe	Kaluhiwa v.	246
Keae	Kaluhiwa v.	246
Keahilihau v.	King	139
Kealoha v.	Makekau	418
Kealoha v.	Makekau	593
Keanu	Hoomana Naauao v.	418
Keanu	Hoomana Naauao v.	593
Keanu	Hoomana Naauao v.	597
Kekuewa	Hoomana Naauao v.	418
Kekuewa	Hoomana Naauao v.	593
Kekuewa	Hoomana Naauao v.	597
Keliinoi	Van Giesen v.	558
King	Kahepu v.	137
King	Kahepu v.	577
King	Keahilihau v.	139
Kioloku. Title of		170
Kioloku. Title of		357
Kobayashi	Territory v.	762
Kobayashi	Territory v.	776
Koki v.	Auditor	406
Kolowena	Territory v.	556
Kona Dev. Co.	Scott v.	386
Konno	Jeffreys v.	465
Konno	Scott v.	386
Kukahi	Hurst v.	194
Kukapu	Territory v.	556
Kumalae	Hollinger v.	669
Kumalae v.	Kalauokalani	1.
Kumalae v.	Kalauokalani	36
Kumalae	Nahaolelua v.	423
Kupukaa v.	Gray	189
Kwong Hop Wo v.	Young Sak Cho.	494
Lalakea, Estate of.		43
Lalakea	First Bank of Hilo v.	43
Lalakea	Makainai v.	470

CASES REPORTED.

xvii.

Lane	Colburn v.	482
Lane	Colburn v.	518
Lau Sing v.	Young Sak Cho.....	494
Lee Chew Tai v.	Tom Choy	700
Lewers & Cooke v.....	Jones	214
Libby, McNeill & Libby...	Haw'n Pineapple Co. v...	53
Liliuokalani, Estate of...		127
Lino	Territory v.	556
Lo v.	Trust Co.	185
Loika	Territory v.	556
Lopez, Estate of		197
Lord v.	Auditor	76
Lorigan, in re		445
Low	Nahaolelua v.	423
Lufkin v.	Grand Hotel Co.	150
Luiz	Damon v.	98
Luka	Kaluhiwa v.	246
Lum Yet v.	Young Sak Cho	494
Lyman	Territory v.	307
Lyman	Territory v.	381
Maciel	Rhoades v.	579
Maguire	First Bank of Hilo v.....	43
Maguire Estate v.	Ai	621
Maia v.	Makekau	418
Maia v.	Makekau	593
Maia v.	Makekau	597
Makainai v.	Lalakea	470
Makanoa	Territory v.	556
Makekau	Hoomana Naauao v.....	418
Makekau	Hoomana Naauao v.....	593
Makekau	Hoomana Naauao v.....	597
Malie	Kaluhiwa v.	246
Man Chin v.	Young Sak Cho.....	494
Mandamus, Brandt v....	Kaneakua	51

Mandamus, Judge Second Circuit	570
Mandamus, Kumalae v... Kalauokalani	1
Mandamus, Kumalae v... Kalauokalani	36
Mandamus, Lorigan v.... Board of Dental Exami- ners	445
Mandamus, Pacheco v.... Kalauokalani	1
Mandamus, Pacheco v.... Kalauokalani	36
Manlapit, re	547
Manuwai v. Richardson	611
Marks	Territory v. 219
Marques	Damon v. 98
Mayor City and County.. Nahaolelua v.	423
McCandless v. Castle	22
McCandless v. Castle	182
McClellan	Nahaolelua v. 423
McClellan v. Wodehouse	561
Menefoglio, re taxes.....	106
Meyer, Estate of	613
Meyer, Estate of	667
Miguel	Kaluhiwa v. 246
Miura v. Achi	558
Moldenhauer	McCandless v. 22
Moldenhauer	McCandless v. 182
Moore	Damon v. 98
Moranho v. De Aguiar	267
Moranho v. De Aguiar	271
Moses v. Nobriga	303
Moses v. Nobriga	483
Muscoto	Castanha v. 508
Nahaolelua v. Fern	423
Nakea v. Makekau	418
Nakea v. Makekau	593
Nakea v. Makekau	597
Nakuina	Yee Hop v. 205

CASES REPORTED.

xix.

N. Y. Life Ins. Co.....	Rumsey v.	141
Nicholas	Hoomana Naauao v.....	418
Nicholas	Hoomana Naauao v.....	593
Nicholas	Hoomana Naauao v.....	597
Nobriga	Barnard v.	303
Nobriga	Moses v.	483
Oahu Market	Yee Hop v.	494
O. R. & L. Co. v.....	Kaili	378
Ogata v.	Achi	558
Onomea Sug. Co., re taxes.....		278
Paauhau Sug. Plant'n Co., re taxes		278
Pacheco	Hollinger v.	669
Pacheco v.	Kalauokalani	1
Pacheco v.	Kalauokalani	36
Pacheco	Nahaolelua v.	423
Pacific Auto. & Machine Shop	Damon v.	98
Pacific Eng. Co.	Hoomana Naauao v.....	597
Palaualelo	Kahue v.	805
Parke v.	Parke	397
Parke Estate	Parke v.	397
Paxson v.	Schuman Car. Co.....	719
Pele	Hoomana Naauao v.....	418
Pele	Hoomana Naauao v.....	593
Pele	Hoomana Naauao v.....	597
Petrie	Nahaolelua v.	423
Phoenix Lodge v.....	Trent Trust Co.....	159
Pilipo	Scott v.	386
Poi v.	Makekau	418
Poi v.	Makekau	593
Poi v.	Makekau	597
Prohibition, Judge Fifth Circuit		558
Prohibition, Judge Fourth Circuit		638

Puana	Territory v.	584
Rapid Transit Co.	City and County v.	332
Reiny	Territory v.	219
Reliable Transfer Co.	Damon v.	98
Resolutions		821
Rhoades v.	Maciel	579
Richardson	Farden v.	611
Robinson	Rosenbledt v.	561
Robinson	Territory v.	651
Robinson v.	Wodehouse	561
Rooney v.	Achi	558
Rosenbledt v.	Wodehouse	561
Rosenbledt	Wong Wong v.	92
Rosenbledt	Wong Wong v.	347
Rosenbledt	Wong Wong v.	413
Rosenbledt	Wong Wong v.	739
Rules		825
Rumsey v.	N. Y. Life Ins. Co.	141
Saito	Haw'n Pineapple Co. v. ...	53
Sam Hop Kee v.	Young Sak Cho.	494
Sam Wo Lee v.	Young Sak Cho.	494
Sanderson v.	Sanderson	172
Sanderson v.	Sanderson	274
Sanderson v.	Sanderson	427
Scharsch	Territory v.	429
Schuman Carriage Co.	Paxson v.	719
Scott v.	Ai	621
Scott v.	Pilipo	386
Shadina v.	Ai	621
Shaw	Farden v.	611
Shee Wo v.	Young Sak Cho.	494
Shee Wo Hing v.	Young Sak Cho.	494
Skating Rink	Wong Wong v.	92

CASES REPORTED.

xxi.

Skating Rink	Wong Wong v.	347
Skating Rink	Wong Wong v.	413
Skating Rink	Wong Wong v.	739
Spalding	Stewart v.	644
Spalding	Stewart v.	745
Springer v.	Springer	638
Springer v.	Thompson	638
Sumitomo Bank v.	Hawaii Nosan Shokwai... .	646
Sumitomo Bank v.	Hawaii Nosan Shokwai... .	691
Supervisors City and County	Nahaolelua v.	423
Steere v.	De La Nux	438
Stephenson	Hoomana Naauao v.	597
Stewart	Crawford v.	226
Stewart	Crawford v.	300
Stewart v.	Spalding	644
Stewart v.	Spalding	745
Takamaku	Territory v.	762
Takamaku	Territory v.	776
Takamatsu	Territory v.	762
Takamatsu	Territory v.	776
Tax Assessor	Frear v.	603
Taxes, American Factors Co.		769
Taxes, Honokaa Sug. Co.		278
Taxes, Hutchinson Plantation		278
Taxes, Menefoglio		106
Taxes, Onomea Sug. Co.		278
Taxes, Paauhau Sug. Plant'n Co.		278
Taxes, Waiakea Mill Co.		628
Taylor v.	City and County.	58
Taylor v.	City and County.	632
Territorial Auditor	County of Hawaii v.	372
Territorial Auditor	Koki v.	406
Territorial Auditor	Lord v.	76

Territory v.	Anderson	55
Territory v.	Azevedo	55
Territory v.	Barques	521
Territory v.	Chee Siu	814
Territory v.	Fong Yee	309
Territory v.	Gamaya	581
Territory v.	Gay & Robinson	651
Territory v.	Hirota	802
Territory v.	Howell	320
Territory v.	Hutchinson Plantation	170
Territory v.	Hutchinson Plantation	357
Territory v.	Kahue	747
Territory v.	Kauhane	307
Territory v.	Kauhane	381
Territory v.	Kobayashi	762
Territory v.	Kobayashi	776
Territory v.	Makanoa	556
Territory v.	Marks	219
Territory v.	Puana	584
Territory v.	Scharsch	429
Territory v.	Wills	747
Testa heirs v.	Ai	621
Thompson	Springer v.	638
Thurston v.	Irwin	786
Thurston v.	Irwin	807
Thurston v.	Irwin	813
Title of Kioloku		170
Title of Kioloku		357
Todd	Territory v.	307
Todd	Territory v.	381
Tom Choy	Lee Chew Tai v.	700
Tomishima v.	Hurley	165
Tom Yong v.	Young Sak Cho	494
Treasurer City and County. Holt v.		335
Treasurer City and County. Taylor v.		58

CASES REPORTED.

xxiii.

Treasurer City and County. Taylor v.	632
Trent v. Carter	518
Trent v. U. S. Fidelity & Guar. Co.	536
Trent Trust Co. Phoenix Lodge v.	159
Trust Co. v. Galbraith	174
Trust Co. Lo v.	185
Trust Co. Phoenix Lodge v.	159
Tsuru v. Bayer	693
Tuck Lee Co. v. Young Sak Cho.	494
Turin Lewers & Cooke v.	214
Ueda v. Achi	558
U. S. Fidelity & Guar. Co. Colburn v.	479
U. S. Fidelity & Guar. Co. Colburn v.	536
U. S. Fidelity & Guar. Co. Territory v.	320
Van Giesen v. Achi	558
von Hamm-Young Co. v. .. Hawaii Garage	253
von Holt Wilson v.	529
Waiahao (w) Territory v.	556
Waiahole Water Co. Foster v.	726
Waiakea Mill Co., re taxes	628
Waikau v. Ai	621
Walbridge Parke v.	397
Wall Lorigan v.	445
Weedon v. Makekau	418
Weedon v. Makekau	593
Weight v. Achi	558
Wharton Minors	121
Wilder Frear v.	603
Wilder Estate v. I.-I. S. N. Co.	178
Will of Castle	786
Will of Castle	807
Will of Castle	813
Will of Colburn	518

Will of Colburn	536
Will of Galbraith	174
Will of Williams	22
Will of Williams	182
Williams v. Boeynaems	588
Williams	22
Williams	182
Williams, Estate of.....	182
Williams, Will of	22
Williams, Will of	182
Wills	747
Wilson v. von Holt	529
Wodehouse	561
Wong Pun v. Young Sak Cho.....	494
Wong Wong v. Skating Rink	92
Wong Wong v. Skating Rink	347
Wong Wong v. Skating Rink	413
Wong Wong v. Skating Rink	739
Wright	22
Wright	182
Yates	307
Yates	381
Yee Hop v. Nakuina	205
Yee Hop v. Young Sak Cho.....	494
Yee Kee v. Young Sak Cho.....	494
Yong Fook v. Young Sak Cho.....	494
Yong Wah Gum v..... Young Sak Cho.....	494
Young Sak Cho	494
Zeugma, Bishop of..... Williams v.	588

CASES DECIDED
BY THE
SUPREME COURT
OF THE
TERRITORY OF HAWAII

**JONAH KUMALAE v. DAVID KALAUOKALANI,
CLERK OF THE CITY AND COUNTY OF HONO-
LULU.**

No. 1195.

**MANUEL C. PACHECO v. DAVID KALAUOKALANI,
CLERK OF THE CITY AND COUNTY OF HONO-
LULU.**

No. 1196.

**RESERVED QUESTIONS FROM CIRCUIT JUDGE, FIRST CIRCUIT.
HON. J. T. DEBOLT, JUDGE.**

ARGUED JUNE 30, 1919.

DECIDED JULY 1, 1919.

COKE, C. J., KEMP AND EDINGS, JJ.

**MANDAMUS—*ministerial official duty—performance compelled by man-
damus.***

Where a plain official duty, purely ministerial, requiring the exercise of no discretion, is to be performed and performance is refused, mandamus will lie upon the application of the party aggrieved to compel its performance.

Opinion of the Court.

ELECTIONS—*duty of canvassing officer ministerial.*

In the matter of canvassing the returns and issuing certificates of election the duty of the canvassing officer is purely ministerial.

SAME—*canvassing officer has no right to inquire into eligibility.*

The canvassing officer has no right to go behind the returns and inquire into the eligibility of a candidate but must issue a certificate of election to the one who on the face of the returns has the highest number of votes.

SAME—*certificate of—mandamus—eligibility not an issue.*

In a mandamus proceeding to compel the canvassing officer to issue a certificate of election to the one who on the face of the returns has the highest number of votes the petitioner's eligibility to be elected is not an issue.

SAME—*same—same—issuance of certificate to another no defense.*

The wrongful issuance of a certificate to a candidate not receiving the highest vote is not a defense in a mandamus proceeding by the party rightfully entitled thereto.

OPINION OF THE COURT BY KEMP, J.

(Coke, C. J., dissenting in part and concurring in part.)

These cases are before us upon questions reserved to us by the second judge of the first judicial circuit, the questions in the Pacheco case being as follows:

"1. In this case does the following question arise, namely: was the petitioner, M. C. Pacheco, at the time of the election held on June 3, 1919, for supervisors of the City and County of Honolulu ineligible for election as one of said supervisors by reason of the fact that at the election held on November 5, 1916, he was duly elected as a member of the senate of the legislature of the Territory of Hawaii to serve for the term of four years?"

"2. If the question aforesaid of eligibility does arise in this case, was the petitioner at the time of the election of June 3, 1919, eligible for election as one of the supervisors of the City and County of Honolulu?"

"3. Should the court grant the petitioner's motion to strike certain allegations from the respondent's return and the motion to strike certain exhibits (letters) from

Opinion of the Court.

the files, which motions were noted by the court reporter and are reported herewith?

“4. Should the alternative writ heretofore issued herein be made peremptory?”

The questions in the case of Jonah Kumalae against the same respondent are the same as the above except in the first question it is stated that petitioner was in 1918 elected to the house of representatives to serve for a term of two years.

In a memorandum opinion heretofore filed we held, without setting forth any reasons therefor, that the first of said questions should be answered in the negative, that because of our answer to the first question it became unnecessary to answer the second question and that the third and fourth questions should be answered in the affirmative. It will now be our endeavor to set forth the reasons for our answer as above set forth.

A brief statement of the proceedings had in the lower court, together with the facts there developed, will be necessary to an understanding of our views. It appears that at an election held in the City and County of Honolulu on June 3, 1919, the petitioners were two of fourteen candidates for the office of supervisor of the City and County of Honolulu; that of the fourteen candidates for said office seven were to be elected; that from the official tabulation of the votes received by the various candidates it appeared that the petitioner Pacheco received the highest number of votes and the petitioner Kumalae received the third highest vote; that the respondent is the city and county clerk, the officer who under our statute tabulates the returns and issues certificates of election; that after the votes had been tabulated petitioners made demand upon respondent that he issue to them certificates of election and that he has

Opinion of the Court.

failed and refused and still fails and refuses to issue to them such certificates.

Petitioners each filed a petition for mandamus against respondent setting forth the facts as above outlined but in more detail, and each prayed for the issuance of an alternative writ commanding the respondent to issue and deliver him a certificate of election in due form or to show cause within a time to be fixed by the court why he should not do so. Upon these petitions the alternative writs were issued as prayed in which respondent was commanded to issue and deliver to such petitioner his certificate of election to the office of supervisor of the City and County of Honolulu or to show cause at 9 o'clock a. m. on Saturday, June 21, 1919, why he should not do so. The writs were dated and issued on June 19, 1919, and were served at 3:35 o'clock p. m. of the same day.

From this point on for convenience we will refer to only one of the cases as anything that is said in one will apply with equal force in the other.

At the hour fixed in the alternative writ for respondent to show cause he filed a motion to quash the writ on the ground that the writ did not comply with the statute in that it did not direct him to do what had been demanded of him or show cause to the contrary within a certain time after service of the order, fixed by any court, justice or judge, and upon the further ground that he had had less than forty-eight hours written notice of the hearing of said matter. The motion to quash was overruled whereupon respondent demurred to the writ generally and specially that said writ does not show that the petitioner is eligible to fill the office and does not show that he is a citizen of the United States of America and of the Territory of Hawaii and that he has been a duly qualified elector of said Territory and of the City and

Opinion of the Court.

County for at least two years next prior to the election in the petition alleged. Before a ruling was had upon the demurrer the petitioner, with the permission of the court, amended his petition and the writ was thereupon amended so as to allege that he is a citizen of the United States and of the Territory and that he has been a duly qualified elector of said Territory and of the City and County for more than two years next prior to said election. No allegation of general eligibility to hold the office of supervisor was made. Upon the allowance of this amendment the demurrer was overruled and respondent filed his return to the alternative writ.

The return admits that the petitioner possesses the qualifications alleged in the amended petition and set forth in the amended writ; that he was a candidate for the office of supervisor at said election as alleged and that there were the fourteen candidates (seven were elected) as alleged. Answering the allegation to the effect that respondent as county clerk and returning officer immediately upon the receipt of statement of votes and poll lists from the inspectors of election tabulated the same and ascertained that the totals of said votes cast at said election were as alleged by petitioner and as set forth in said alternative writ, he says that he is advised by counsel that the votes alleged to have been cast for the petitioner were not cast for him and he therefore denies that the said votes or any of them were cast for petitioner. Answering the allegation to the effect that after the respondent had tabulated the votes as alleged and ascertained the fact that petitioner had received the highest number of votes of any of said fourteen candidates demand was made upon him by petitioner that he issue to petitioner a certificate of his election he admits that such demand was made and that he refused and still refuses to issue and deliver such certifi-

Opinion of the Court.

cate but denies that same was after the respondent had received and tabulated the returns as alleged or ascertained that the totals were as set forth in said alternative writ and alleges that said demand was subsequent to the issuance of certificates to Edward P. Fogarty and William J. Sheldon hereinafter referred to.

Said return further sets forth that after respondent had received the returns of said election and while he was proceeding to tabulate the same and ascertain the results of said election he received a letter from J. H. Fisher, a citizen and elector of the City and County of Honolulu, demanding that upon the face of the returns certificates of election be issued to Edward P. Fogarty and William J. Sheldon as among the seven receiving the highest number of votes, on the ground that petitioners were not eligible to be elected to said office one being a member of the senate of the Territory and the other a member of the house of representatives of the Territory, and that said letter called his attention to the fact that the attorney general of the Territory had held that petitioners were not eligible, and claiming that said ineligibility being known to the voters their votes could not be counted; that being in doubt as to his duty in the matter he applied to the city and county attorney for his opinion in the matter and was advised by said city and county attorney that certificates should be issued to said Fogarty and Sheldon and that he thereupon did issue certificates to said Fogarty and Sheldon. Copies of the letter from said Fisher and the opinions of the attorney general and of the city and county attorney were attached to the return as exhibits.

The return further sets up the fact that petitioner was a member of the territorial legislature at the time of said election and that the court should not in its discretion issue the writ because he says it would enable

Opinion of the Court.

petitioner to claim an office which he is ineligible to be elected to.

The return further sets up the fact that criminal prosecutions have been instituted and are now pending against the respondent for his failure to issue such certificates and that as a matter of discretion the court should not issue said writ while said criminal prosecutions are pending, and that further by reason of the facts aforesaid a speedy and adequate remedy at law is provided in that the title to said office can be tested by *quo warranto* after July 1, 1919.

Petitioner made a motion to strike from the records of this case the exhibits attached to respondent's return and all allegations in said return challenging petitioner's eligibility and alleging the pendency of criminal prosecutions against respondent for his failure and refusal to issue said certificates.

In reply to said return petitioner denied that any of the matters set up in said return constituted grounds why the peremptory writ should not issue.

After the hearing of evidence the court reserved the questions above set out to this court and accompanied them with his findings of fact, the substance of which follows:

After finding facts in substance the same as alleged in the alternative writ he finds that petitioner is a member of the territorial legislature and that during the campaign preceding the primary election and the county election thereafter there were daily discussions in campaign speeches by petitioner and others before the voters in all parts of the county concerning petitioner's eligibility, in which the opinion of the attorney general holding petitioner ineligible together with the opinion of the former attorney general to the contrary were discussed, petitioner claiming to be eligible, and that as a result of

Opinion of the Court.

these discussions the voters became fully advised of said opinions of the attorney general and the former attorney general and that petitioner was a member of the territorial legislature at the time of said election.

The answer to the first question is, in our view of the case, controlling in answering the remaining questions. It is a general principle of law well established by the decisions of the courts throughout the country that when a plain official duty, purely ministerial, requiring the exercise of no discretion is to be performed and performance is refused mandamus will lie upon the application of the party aggrieved to compel its performance. *Board of Liquidation v. McComb*, 92 U. S. 531; *Garfield v. Goldsby*, 211 U. S. 249; *State ex rel Harvey v. Mason*, 45 Wash. 234.

It has been universally held, we believe, that the duty of the canvassing officer in the matter of canvassing the returns and issuing certificates of election is purely ministerial. 15 Cyc. 379; *People v. Hilliard*, 29 Ill. 413; *Commonwealth ex rel Parker v. Emminger*, 74 Pa. 479; *Page v. Utah Commission*, 11 Utah 119; *Coll v. Canvassers*, 83 Mich. 367; *Lewis v. Commissioners*, 16 Kan. 102-108. There is nothing in our statute that justifies a different conclusion. Under our statute the city and county clerk is the canvassing officer in city and county elections and the statute prescribes among other things that "the persons receiving the highest number of votes shall be declared elected, and the city and county clerk shall immediately deliver to the persons elected certificates of election" (Sec. 1686 R. L. 1915). This statute leaves no room for doubt as to what the duty of the clerk is in respect to the delivery of certificates. It is his duty to deliver certificates to the ones who on the face of the returns have received the highest number of votes and in ascertaining who has received the highest

Opinion of the Court.

number of votes and issuing certificates he has only ministerial duties to perform.

But it has been contended in behalf of the respondent that the petitioner is ineligible to be elected to said office and that the facts upon which it is claimed the petitioner is ineligible being undisputed renders the determination of his eligibility purely a question of law and that regardless of whether respondent had the right to pass upon his eligibility the court should in this proceeding determine the question, because if ineligible it would serve no useful purpose to issue to him a certificate of election to an office from which he could be immediately removed.

People v. Board of Canvassers, 129 N. Y. 360, is the case principally relied upon in support of this contention and it undoubtedly supports it. In that case the court took the view that as the question of the candidate's eligibility had attracted much public attention the public interest required that they should meet and determine the question of eligibility if within their judicial competency to do so. It was decided by a divided court that, the eligibility depending upon undisputed facts, it would be unfortunate to have the case go through all the courts and to leave the most important and vital matter in it undecided. Accordingly the court decided the question of eligibility against the candidate and refused to authorize the writ to aid him in accomplishing what is termed a wrong. There is no disposition upon our part to question the soundness of the abstract proposition of law to the effect that the writ will not issue to compel the performance of an unlawful act or to aid one in carrying out an unlawful proceeding. What we do question is the application of this principle to such a case as the one before us.

In the case of *Kanealii v. Hardy*, 17 Haw. 1, which

Opinion of the Court.

was a mandamus proceeding to compel a circuit judge to approve the bond of one who had a certificate of election to the office of supervisor, said judge having refused to approve said bond on the ground, as claimed, that certain names on petitioner's nomination papers were forged, this court speaking through Chief Justice Frear, said: "The judge is not given any jurisdiction in passing upon the sufficiency of the bond to decide upon the validity of the nomination papers. Neither the petitioner nor any one else has been convicted of forging the nomination papers, nor has the validity or invalidity of those papers been determined in quo warranto or any other proceedings. It is true that an officer who is charged with the duty of approving the bond of another officer is not obliged to approve a bond presented by any person. It is his duty to approve the bond of only the person entitled to the office, and yet all that he can require is proper credentials of the applicant or a prima facie showing that the applicant is entitled to the office; he cannot in general enter into an investigation for the purpose of passing upon the validity of those credentials or at least the validity of the acts leading up to the acquisition of those credentials. The approval of the bond does not assume the validity of the election but is merely one step in the process by which the applicant may be put in a position to show an apparent right or to contest proceedings that may be brought questioning his title to the office. How, for instance, in the present case, could the petitioner sustain his right to the office in the quo warranto proceedings in the absence of the approval of his bond, even if he showed that his nomination papers were valid? Even this court, in these mandamus proceedings, cannot go into the question of the validity of the nomination, for mandamus is not a proper method of determining title to office. Courts often compel by

Opinion of the Court.

mandamus boards of canvassers to count the ballots and declare the results irrespective of alleged violations of law in the prior stages of an election.”

In *Harris v. Cooper*, 14 Haw. 145, this court held that it was the duty of the secretary to place on the ballot the name of a candidate duly nominated even though he was ineligible, and declined to compel the secretary to omit such name even though for the purpose of that case (submitted on agreed facts) it was admitted that he was ineligible.

If, as stated by Chief Justice Frear in *Kanealii v. Hardy*, the relator was entitled to have his bond approved without regard to whether his nomination papers were forged, as one step in the process by which the applicant may be put in position to show an apparent right or to contest proceedings that may be brought questioning his title to the office, how can it be said that the petitioner in this case is not entitled to his certificate of election regardless of whether he is eligible or ineligible? Without his certificate of election he cannot show his right to have his bond approved “as a step in the process by which he may be put in a position to show an apparent right to said office.”

The case of *People v. Board of Canvassers* was discussed by this court in both *Kanealii v. Hardy* and *Harris v. Cooper*, and while in neither case was there an express disapproval of said decision the conclusion reached in those cases seems to be contrary to that reached by the New York court. We think that both the weight of authority and reason support the minority opinion in the New York case, where it is held that the writ should issue to compel the canvasser to issue a certificate of election to the petitioner who upon the face of the returns received the highest number of votes without considering the question of his eligibility.

Opinion of the Court.

"When an act, the doing of which is sought to be compelled by mandamus, is the final thing and if done gives to the relator all that he seeks proximately or ultimately, then the question whether he is entitled to have that done may be inquired into by the officer or person to whom the mandamus is sought, and is also to be considered by the tribunal which is moved to grant the mandamus, but where the act to be done is but a step towards the final result, and is but the means of setting in motion a tribunal which is to decide upon the right to the final relief claimed, then the inferior officer or tribunal may not inquire whether there exists the right to the final relief, and can only ask whether the relator shows a right to have the act done which is sought from him or it." *People ex rel Freer v. Canal Appraisers*, 73 N. Y. 446.

In the present case petitioner's final and ultimate relief is the judgment of a court of competent jurisdiction, rendered in an appropriate proceeding in which all the necessary parties are present, as to whether he was duly elected supervisor and entitled to hold the office, and that final relief involves not only his plurality of votes but his qualifications as well. But he is here, not asking that final relief but seeking to take one step necessary as a preliminary to it, which involves only the count, but not his qualifications, and neither the county clerk nor the court, in considering his right to that step, can inquire into his right to a different and further ultimate relief.

Let us suppose that in this proceeding we should determine the question of the petitioner's eligibility and decide it in his favor and it should afterwards develop that some one, not a party to this proceeding, desired to contest his right to the office by *quo warranto* or other proceedings on the ground of his ineligibility and that by reason of the alleged ineligibility said party is entitled to be inducted into or to hold said office. Under such

Opinion of the Court.

circumstances this court would be placed in the position of having decided the case against the contestant without his having been given a chance to be heard. This supposition is not far-fetched for it appears from respondent's return to the alternative writ issued herein that instead of issuing certificates to these petitioners certificates of election have been issued by the respondent to Edward P. Fogarty and William J. Sheldon, the candidates at said election who received the eighth and ninth highest vote as shown by the face of the returns and yet the holders of these certificates are not parties to this proceeding and could not have been made parties and therefore could not be bound by any judgment, order or decree entered herein.

To compel the issuance of the certificate of election to the petitioner in this case without going into the question of eligibility is simply to compel an observance of that orderly procedure in elections which the law prescribes. It should have the very desirable effect of teaching city clerks that they have no judicial functions and that they must content themselves with doing that which the law requires them to do, viz., to ascertain who has the highest number of votes and to issue a certificate of election to that person. The fact that certificates of election have already been issued to others affords no reason why we should not require respondent to issue a certificate to the party entitled thereto. The respondent cannot set up his own wrongful conduct as a defense to this action. *Smith v. Lawrence*, 2 S. D. 185; 15 Cyc. 387; *Ellis v. County Commissioners*, 2 Gray (Mass.) 370; *State v. Trimbell*, 12 Wash. 440, 41 Pac. 183; *Coll v. Canvassers*, *supra*.

Counsel have insisted that the theory upon which we hold that the question of eligibility of petitioner is not involved in this case has been disapproved by the Su-

Opinion of the Court.

preme Court of the United States in two recent decisions and have referred us to the cases of *Duncan Townsite Co. v. Lane*, 245 U. S. 308, and *United States v. Fisher*, 222 U. S. 204.

It is in our opinion a sufficient answer to this argument to point out that in each of these cases the petitioner sought to procure the final relief to which he would in any event be entitled. In the *Duncan Townsite Co.* case the petitioner sought a mandamus to compel the Secretary of the Interior to restore the name of one Alberson to the rolls under the Choctaw-Chickasaw agreement and to execute and record a patent for land described in an allotment certificate issued in his name by the Dawes Commission. The trial court entered judgment for the petitioner commanding issue and record of the patent but made no order in respect to restoring Alberson's name to the rolls. The petitioner acquiesced in the judgment; but upon writ of error sued out by respondent the judgment was reversed by the court of appeals and the petitioner brought the case to the Supreme Court on writ of error. In affirming the judgment of the court of appeals the Supreme Court said: "We are not required to decide whether (as suggested in *Lowe v. Fisher*, 223 U. S. 95, 107) the power to remove Alberson's name from the rolls had, because of §2 of the Act of April 26, 1906, expired before the Secretary acted. For the Supreme Court of the District did not order the name restored, and its judgment was acquiesced in by the relator. The claim which the relator makes in this court rests wholly upon the fact that the relator was a *bona fide* purchaser for value. But the doctrine of *bona fide* purchaser for value applies only to purchasers of the legal estate. *Hawley v. Diller*, 178 U. S. 476, 484. It 'is in no respect a rule of property, but a rule of inaction.' Pomeroy, Equity Jurisprudence,

Opinion of the Court.

§743. It is a shield by which the purchaser of a legal title may protect himself against the holder of an equity, not a sword by which the owner of an equity may overcome the holder of both the legal title and an equity. *Boone v. Chiles*, 10 Pet. 177, 210" (p. 311).

Applying the above principles the court used language which is relied upon here but which we think has no application to the case before us. The other case referred to is subject to the same criticism.

If the relief sought by the petitioner was that he be inducted into the office to which he claims to have been elected he would then be compelled to show not only that he received the necessary votes to elect him but that he was and is eligible to be so elected.

Garfield v. Goldsby, 211 U. S. 249, was a mandamus by Goldsby to require the then Secretary of the Interior to erase certain marks and notations theretofore made by his predecessor in office upon the rolls, striking therefrom the name of Goldsby as an approved member of the Chickasaw nation and to restore him to enrollment as a member of the nation. It did not appear from the pleadings that Goldsby was an original enrolled member of the tribe but it did appear that he had been enrolled as a member of the Chickasaw nation by the Dawes Commission and had received an allotment of land but no patent had been issued for the same. The Secretary of the Interior without notice to relator erased his name from the rolls. In affirming a judgment requiring the Secretary to restore the relator's name the court said: "The government contends, and we have held, that it does not appear in this case whether Goldsby's name was on the original or other tribal rolls, a fact essential to be known in order to determine whether his contention be sound that such an enrollment gave him the right to participate in the division of the funds and lands of

Opinion of the Court.

the nation irrespective of the action of the Dawes Commission, the court of the Indian Territory, or the citizenship court. The question here involved concerns the right and authority of the Secretary of the Interior to take the action of March 4, 1907, in summarily striking the relator's name from the rolls. That is the question involved in this case" (p. 264).

It will be noted that the principal difference between this case (*Garfield v. Goldsby*) and that of *Duncan Townsite Co. v. Lane* is that in this case the petitioner only sought to have his name restored to the rolls while in the other case the relief sought was to have a patent issued and recorded, which would have vested in him the legal title to the land and was the final or ultimate relief to which the petitioner would in any event be entitled.

In the course of the opinion in *Garfield v. Goldsby* it was said, "There is no place in our constitutional system for the exercise of arbitrary power, and if the Secretary has exceeded the authority conferred upon him by law, then there is power in the courts to restore the status of the parties aggrieved by such unwarranted action." These remarks apply with equal force to the facts of this case.

So we hold that in the present case the question of petitioner's eligibility to be elected to the office for which he was a candidate is not an issue. From this it necessarily follows that the second question should be returned by us unanswered. It also follows, we think, that the exhibits attached to the respondent's return and the allegations of the return which challenge petitioner's eligibility should be stricken as they do not relate to any issue before the court. Neither does the fact that criminal prosecutions are now pending against the respondent involving his refusal to issue the certificate

Opinion of Coke, C. J.

of election have any bearing upon any issue here involved, nor does that fact offer any excuse for refusing the writ as a matter of discretion. The objections made to the writ and set out in our statement of the proceedings are extremely technical and were properly overruled by the trial judge.

No valid reason having been shown why this case should not come within the rules of law announced we must conclude that it is the duty of the trial judge to issue the peremptory writ.

E. M. Watson and *A. Perry* (*Watson & Clemons, Perry & Mattheuman* and *C. M. Hite* on the brief) for petitioners.

D. L. Withington and *C. H. Olson* (*Castle & Withington* and *Robertson & Olson* on the brief) for respondent.

OPINION OF COKE, C. J., DISSENTING IN PART AND
CONCURRING IN PART.

In all that has been said by my associates in reference to reserved questions numbered 3 and 4 I fully concur. The alternative writ of mandamus should be made peremptory. The petitioners Kumalae and Pacheco having received the highest number of votes were each entitled to receive from the respondent Kalauokalani, the city and county clerk, a certificate of election as supervisor of the City and County of Honolulu. The duties of the clerk are purely ministerial and are so plainly expressed in section 1686 R. L. 1915 that it would seem there should be no honest difference of opinion in respect thereto. But in the face of his duties, clearly defined by statute, the clerk has attempted to clothe himself with judicial functions and arrogate to himself the right to sit in judgment and determine judicially whether the two petitioners are eligible to hold the offices to which they were elected by popular vote — an unwarranted assump-

Opinion of Coke, C. J.

tion of power which was clearly *ultra vires*—the usurpation of authority which calls for prompt intervention by judicial authority. The clerk has attached to his return certain communications. One of these is a letter addressed to the respondent Pacheco, signed by the attorney general of the Territory, holding that Pacheco was not eligible for election to, or service on, the board of supervisors of the City and County. Nothing, however, is contained in this communication having reference to the duties of the clerk of the City and County of Honolulu and the same is in no wise pertinent to the issue. Another communication is addressed to the clerk and signed by J. H. Fisher, who purports to write as a citizen of the City and County of Honolulu, demanding that certificates of election be issued to Edward P. Fogarty and William J. Sheldon. As neither Fogarty nor Sheldon was elected to the office for which certificates of election were demanded by Fisher this communication should have been ignored by the clerk. Another letter purporting to come from the city and county attorney is attached to the return. It advises the clerk that Pacheco and Kumalae are not eligible to hold the office of supervisors of the City and County of Honolulu and that certificates of election cannot be issued to them and further advises the clerk to issue certificates of election to Fogarty and Sheldon. This communication to the clerk counsels him to disregard his duties plainly prescribed by statute and is so palpably erroneous and so at variance with the provisions of the statute as to render it utterly worthless as a justification for the failure on his part to perform his duties as prescribed by law.

Upon the first reserved question, that is to say: "1. In this case does the following question arise, namely: was the petitioner, M. C. Pacheco, at the time of the election held on June 3, 1919, for supervisors of the City

Opinion of Coke, C. J.

and County of Honolulu ineligible for election as one of said supervisors by reason of the fact that at the election held on November 5, 1916, he was duly elected as a member of the senate of the legislature of the Territory of Hawaii to serve for the term of four years?" I am unable to agree with my associates. It was not within the province of the city and county clerk at the time demand was made upon him by the petitioners for the delivery to them of certificates of election to the office to which they were elected to question their eligibility, but after the cause reached the circuit court it was alleged in the return of the respondent, for reasons therein set forth at length, that the petitioners were ineligible for election. This became solely an issue of law, the facts being undisputed, and as long as the question was properly raised in the circuit court I think it became the duty of that court to determine this issue. If as a matter of law the petitioners are ineligible certificates of election would avail them nothing and the entire proceedings would be rendered abortive. If on the other hand petitioners are eligible why not so decide and dispose of the matter? I appreciate the force of what is said to the contrary and I fully recognize that as a general rule title to an office cannot be determined in a proceeding by mandamus, but this, like most rules, has its exceptions, and where as in this proceeding an issue of law has been properly raised questioning the eligibility of the petitioners to hold the office for which they are proceeding by mandamus to require the issuance of certificates of election that issue should as a matter of public policy, if for no other reason, be determined. As said in *Atchinson, County Judge, v. Lucas*, 83 Ky. 451, "When it appears that one is constitutionally ineligible to an office to which he has been elected his application for a writ of mandamus requiring the county judge to

Opinion of Coke, C. J.

permit him to qualify should be refused," and again in the same opinion, "It is well settled that the title to an office cannot be determined in a proceeding by mandamus. * * * This rule, however, must have its exceptions and in a case where the person applying is a citizen, has all the requisites of age, residence, etc., prescribed by the constitution and still not entitled to hold an office, why should the county judge permit her to qualify and enter upon the discharge of its duties?"

The effect of the majority opinion is to overrule *People v. Board of Canvassers*, 129 N. Y. 360, where it was held that a writ of mandamus should not be granted upon the application of an individual to compel the issuance of a certificate of election to one who has no right under the constitution to hold the office, and in that opinion the court proceeds to give utterance to the following strong language which is peculiarly applicable to the case at bar: "The appellants claim that he (appellee) was ineligible under this constitutional provision, and whether he was or not is the important question now to be determined. The question has attracted much public attention: it is fairly involved in this case and the interests of the public require that we should meet and determine it if it is within our judicial competency to do so. It is a pure legal question, depending upon undisputed facts, and it would be quite unfortunate to have this case go through all the courts and to leave the most important and vital matter in it undecided." It is inferred in the majority opinion that this court in *Harris v. Cooper*, 14 Haw. 145, and in *Kanealii v. Hardy*, 17 Haw. 1, overruled *People v. Board of Canvassers*, *supra*. Whether such is the case depends upon the individual interpretation of those opinions. Whatever might have been the intention of this court in that respect, in *Harris v. Cooper*, the opinion in *People v. Board of Canvassers*

Opinion of Coke, C. J.

was referred to as "perhaps the most instructive case that has come to our notice in this connection." And for a case holding contrary to *Harris v. Cooper* see *Wachter v. McEvoy*, 93 Atl. 987. I agree that the facts in *United States v. Fisher*, 222 U. S. 204, and *Duncan Townsite Co. v. Lane*, 245 U. S. 308, are dissimilar to those in the case before us, but it is nevertheless true that some of the principles and much that is said in those opinions do apply here.

I am therefore of the opinion that the question of the eligibility of Messrs. Pacheco and Kumalae is an issue under the pleadings that should be determined by the circuit court and that reserved question No. 1 should be answered in the affirmative.

This conclusion necessarily calls for an answer to reserved question No. 2, that is to say, "were the petitioners at the time of the election of June 3, 1919, eligible for election as supervisors of the City and County of Honolulu." This question in my opinion should also be answered in the affirmative.

A discussion of this subject would necessitate a lengthy opinion and the citation and review of many authorities. The views of a single justice of this court could not judicially determine the matter nor in any way be binding upon the court, hence I shall refrain from a discussion of the subject.

Syllabus.

L. L. McCANDLESS, *v.* W. R. CASTLE, TRUSTEE
UNDER THE WILL OF JOSHUA R. WILLIAMS,
DECEASED, KAHALAUOLA WILLIAMS, ROSE
WILLIAMS, HENRY WILLIAMS, EDWARD
WILLIAMS, GEORGIANA WILLIAMS, JOSE-
PHINE BOYD, GEORGIANA WRIGHT, LYDIA
MOLDENHAUER AND JOSHUA WILLIAMS.

No. 1149.

APPEAL FROM CIRCUIT JUDGE, FIRST CIRCUIT.
HON. W. S. EDINGS, JUDGE.

ARGUED MAY 19, 1919.

DECIDED JULY 1, 1919.

COKE, C. J., KEMP, J., AND CIRCUIT JUDGE DEBOLT
IN PLACE OF EDINGS, J., DISQUALIFIED.

WILLS—construction.

In construing a will the intention of the testator, when it can be ascertained, will be given effect.

RES JUDICATA—pleading.

In an attempt to plead *res judicata* where the pleading does not allege that the party sought to be bound was either a party to the prior proceeding relied upon or in privity with a party thereto such pleading does not raise the issue of *res judicata*.

OPINION OF THE COURT BY KEMP, J.

This is a bill in equity for an accounting. Joshua R. Williams died June 28, 1879, and left a will in which he devised to W. R. Castle all of his estate in trust to “manage and invest the same in such manner as he may judge to be expedient and at any time to sell any portion of my estate, real or personal, without obtaining any order of court and to reinvest the same and to retain entire control of said estate during the term of this trust. And to pay the income of said estate to my wife Kaaikaula Wil-

Opinion of the Court.

liams and to my children, Lydia, the wife of W. Chapman, John, Henry, Joshua, Josephine and Georgiana, in equal shares, during the term of their natural lives, and the survivor of them. And upon the decease of any of my said children, his or her share is to be paid to his or her children, if any, by my said trustee until the decease of the survivor of my said wife and children, when my estate shall be divided. And upon the decease of any of my said children without issue, their share of the income is to be divided by said trustee equally among the survivors and the issue of deceased children." By codicil the daughter Lydia was excluded from participation in the income of the estate and was devised ten dollars in full of any share in testator's estate. W. R. Castle was named trustee and executor of the will. The will was duly probated and said W. R. Castle qualified as executor and trustee and is still acting as such trustee. The testator left surviving him Kaaikaula, his widow, and the following children: Josephine, Georgiana, Joshua, Henry, John and Lydia. The sons Henry and John and the widow Kaaikaula have since died intestate. Kaaikaula, the widow, died in 1881 and left surviving her as her heirs at law her six children named above. John died May 3, 1890, and left surviving him a wife, Kahalauaola, now the wife of Joshua Williams, to whom she was married in 1892; and an only child, Othello Williams, a son by a former marriage. Othello died intestate on or about the 13th day of March, 1900, unmarried, and without issue and having neither father nor mother (his mother having died in 1883) nor legitimate brother or sister living. Henry died December 21, 1891, and left surviving him the defendant Rose Williams, his widow, and six children, Henry, Edward, Georgiana, Anna (Spalding), Hattie P. and Rose K. Hattie P. died in June, 1899, intestate, unmarried and without issue. Rose K. died in

Opinion of the Court.

1908, intestate, after having joined in the deed of January 16, 1906, to plaintiff, hereafter referred to. On or about the 21st day of October, 1899, the defendants Josephine Boyd, Georgiana Williams, Lydia Chapman (Moldenhauer), Joshua Williams, Othello Williams, Kahalauaola Williams and Rose Williams, the latter also purporting to act on behalf of her minor children, executed to plaintiff L. L. McCandless a warranty deed conveying apanas 1 and 2 of R. P. 762, L. C. A. 2042 to Kauohilo and also apanas 1 and 2 of R. P. 764, L. C. A. 2043 to Kawaha. On January 16, 1906, Anna Spalding (widow), Henry Williams, Rose Kekahio (Williams), Edward Williams and Georgiana Williams conveyed to the plaintiff all their right, title, interest and estate in and to the estate of their grandmother Kaaikaula, deceased. At the time of the death of the testator he was the owner of apanas 1 and 2 of R. P. 764, L. C. A. 2043 to Kawaha, but was not the owner of, nor had he any interest in, apanas 1 and 2 of R. P. 762, L. C. A. 2042 to Kauohilo. As to this last tract it appears that Kauohilo, the original grantee thereof, at the time of his death was the owner. He died December 25, 1869, intestate. By decree of this court in probate No. 1881, Opunui, Kaaikaula (wife of Joshua Williams) and Wahine (Wahinekoa) were held to be each entitled to an undivided one-sixth interest in the estate of said deceased. Wahinekoa died prior to June 27, 1883, intestate, leaving as her heirs at law Pele and Mele Nukilani. On June 27, 1883, J. W. Opunui, Pele and Mele Nukilani conveyed to W. R. Castle for the benefit of the heirs of Joshua R. Williams all of the interest of the grantors in L. C. A. 2042. The interest of Opunui, Mele and Pele in L. C. A. 2042 was an undivided one-third interest and was purchased by the trustee with trust funds at the request of the beneficiaries of the estate. Under these circumstances we do not think

Opinion of the Court.

that any of the parties to this controversy are in position to assert that the interest so purchased did not become a part of said estate, and we shall so consider it for the purposes of this case.

On August 23, 1901, plaintiff notified W. R. Castle of the conveyance of October 21, 1899. At the time of the conveyance to plaintiff the lands described in the complaint were leased partly to the Honolulu Sugar Company and partly to Chow Foo at an annual rental of \$35. On March 22, 1902, W. R. Castle sold said lands to the Woodlawn Fruit Company for \$1343.30. On this state of facts L. L. McCandless brought this bill for accounting against W. R. Castle, trustee, and joined all of the beneficiaries of said trust as parties defendant, claiming that he is entitled to the moneys received by said trustee from and for the property which the other defendants attempted to convey to him by the deed of October 21, 1899.

The defendants demurred to the bill for want of equity and the circuit judge reserved to this court the question whether the demurrer should be sustained. This court in 19 Haw. 515 answered this question in the negative, holding that a deed which purports to convey more than the grantor owns is nevertheless operative as to all of the interest which he does own and that the deed of October 21, 1899, operates in equity as an assignment to the plaintiff of the interest at least of Joshua, Josephine and Georgiana in the income derived from the lands in question. The court did not decide who are the remaindermen, whether the remainders are vested or contingent, whether Othello's interest was *pur autre vie* or only during his own life, whether at his death his heirs or devisees took anything, or whether the trustee can be required to account for any share of the income which accrued prior to the date of the notice to him of the assignment. After the demurrer was overruled the defendants

Opinion of the Court.

answered admitting most of the allegations of the bill but denying some and alleging fraud and misrepresentation by McCandless in procuring the deed to be executed and also pleading or attempting to plead *res judicata*. A trial was had on these issues and a decision rendered finding against the defendants on the issues of fraud and *res judicata* and a decree entered decreeing the plaintiff to be entitled to an undivided one-fifth interest in the income of the trust estate created by the will of Joshua R. Williams, deceased, during the life of Joshua R. Williams, the son of decedent, an undivided one-fifth interest in the income of the trust estate created by the terms of the will during the life of Josephine Boyd, a daughter of decedent, an undivided one-fifth interest in the income of the trust estate created by the will during the life of Georgiana Wright, a daughter of decedent; that he is the owner of a vested equitable remainder in and to an undivided one-fifth part, share or interest of the income of the trust created by the will; that he is the owner in fee simple of an undivided one-half interest in and to the lands and premises described in R. P. 762, L. C. A. 2042.

An accounting from defendant W. R. Castle, trustee, is ordered for four-fifths of the income of the trust estate created by the will of Joshua R. Williams, deceased, from August 30, 1901, to March 22, 1902, and four-fifths of such proportionate share of the consideration received by defendant W. R. Castle, trustee, from the Woodlawn Fruit Company, Limited, as the value of lands described in R. P. 764, L. C. A. 2043 bears to the aggregate value of the premises sought to be conveyed by the said deed of W. R. Castle, trustee, to the Woodlawn Fruit Company, Limited, as amended, with interest thereon at the rate of eight per cent. per annum from March 22, 1902, to the date hereof; that he have an accounting from the defendant W. R. Castle, trustee, of one-half of all the rents

Opinion of the Court.

received by him from tenants or occupants of the lands or premises described in R. P. 762, L. C. A. 2042, who leased or occupied the same under lease or tenancies from the said defendant W. R. Castle, acting or pretending to act as trustee under the will and of the estate of Joshua R. Williams, deceased. A. E. Restarick, Esq., was appointed master and was ordered and directed to take and make and report to the court the accounts as above indicated. From this decree all of the defendants have appealed.

The appellants' first contention is that there is no evidence on which to find that the interest of the defendants other than W. R. Castle, trustee, in any portion of the trust fund held by him, was assigned to appellee by the deed of October 21, 1899. This we think is not an open question at this time. This court, in answering the reserved question as to whether the demurrer to the bill should be sustained, held in effect that the deed itself is evidence of that fact and should be given that effect unless at the trial facts were disclosed which would render the enforcement of the assignment harsh and inequitable or impracticable. It was pointed out by way of illustrating what might arise to make the enforcement of the assignment inequitable that the income derived in one or more years from the property here involved might be necessarily applied in whole or in part to losses suffered in connection with other portions of the corpus of the estate, in which event the trial court would be able to protect the trustee as well as all other parties concerned. Under this decision we think it is clear that the plaintiff acquired whatever interest, legal or equitable, the grantors in the deed of October 21, 1899, above referred to, possessed in the lands therein described, and is now entitled to an accounting on that basis unless facts have been disclosed which would render such a decree harsh,

Opinion of the Court.

inequitable or impracticable, or unless, as contended by the appellants, the matter has already been adjudicated in the probate court and that plaintiff procured said deed by fraud. We are unable to see that any facts have been disclosed which would have a tendency to render the enforcement of the assignment harsh, inequitable or impracticable. We also hold that the ruling to the effect that the alleged fraud was not proven and that the discharge of the executor is not a bar to the suit for accounting is correct, but these questions will be further discussed in their order.

In order therefore to determine what the plaintiff's rights are we must determine what the interest of each of the grantors was. In *Williams v. Castle*, 19 Haw. 337, 339, it was held that each of the five children of the testator named in the will acquired thereunder an equitable life interest, in the income of the property the title of which is held by the trustee subject to division upon the happening of an event still in the future. They each also owned in fee simple an undivided $1/36$ interest in L. C. A. 2042, inherited from Kaaikaula, which the trustee assumed to hold, lease and dispose of as part of the estate. Three of those five children are grantors in the deed in question. We have already pointed out that this court held, when this matter was before it on the question of overruling or sustaining the demurrer, that the deed in question operates in equity as an assignment to the plaintiff of the interest at least of Joshua, Josephine and Georgiana in the income derived from the lands in question (*McCandless v. Castle*, 19 Haw. 515). We therefore conclude that from each of these three children the plaintiff acquired a right to the income which such child was entitled to receive from that portion of the trust estate represented by the lands and from the money received by the trustee for the lands forming a part of

Opinion of the Court.

the trust estate and attempted to be conveyed by the three children of the testator and others and the income derived from the $1/36$ interest in L. C. A. 2042 owned by each of them. It is apparent that he also acquired the undivided $4/36$ interest in L. C. A. 2042 owned in fee by these three children and Othello, and Rose's dower interest in her deceased husband's $1/36$ interest, but we are not interested in this as it does not affect the accounting. This holding is not in accord with the finding below as to the interest of these three children of the testator. The finding below is not limited to the income derived from that portion of the trust estate represented by their interest in the land and its proceeds as it should have been, but includes the income derived from their interest in the whole estate as well as a portion of the corpus of the estate. We are not concerned with the interest of the children of Henry, the deceased son of the testator, in the income of the estate. The court below found that the attempt of Rose Williams, their mother, to convey their interest was without authority and did not convey their interest. However they, together with their mother, Rose Williams, did on January 16, 1906, convey to plaintiff all their right, title and interest in the estate of their grandmother Kaaikaula, deceased. Their grandmother at the time of her death owned an undivided $1/6$ interest in L. C. A. 2042 and the father of the grantors was one of the six heirs at law of their grandmother. The most that can be said is that plaintiff by the deed of January 16, 1906, acquired an undivided $1/36$ interest in L. C. A. 2042, but we fail to find where the trustee has assumed to lease and collect rentals from this land since the date of the deed to plaintiff. Under these circumstances if the trustee has continued to lease said lands it is plaintiff's own fault such action has been permitted as such interest as he acquired from the children of Henry Williams was

Opinion of the Court.

a fee simple title and could have been asserted by him at any time.

Lydia's interest in L. C. A. 2042 was the same as her brothers and sisters and was conveyed by the deed of October 21, 1899. She had no interest in the trust estate.

Othello's interest in the trust estate is not so easy to ascertain. His interest in L. C. A. 2042, like the other principal grantors, was an undivided $1/36$ in the fee simple, subject to the dower interest of the stepmother Kahalauaola. There can be no question that had he lived he would have been entitled to the $1/5$ of the income of the trust estate so long as any of the children of the testator survived, but did he possess such a right as was not extinguished by his death? This depends of course upon whether the interest in the income of the estate which a grandchild was to receive under the terms of the will upon the death of his parent was *pur autre vie* or only during the life of such grandchild if such grandchild should die, as Othello did, before the death of the survivor of the testator's children. The intention of the testator when it can be ascertained will be given effect. *Harrison v. Judd*, 3 Haw. 421; *Thurston v. Allen*, 8 Haw. 392.

The will directs the trustee to pay the income to the wife and five named children in equal shares during the term of their natural lives, and then directs that "upon the decease of any of my said children, his or her share is to be paid to his or her children, if any, by my said trustee until the decease of the survivor of my said wife and children, when my estate shall be divided." The will does not provide who shall be the recipients of the estate upon its division, nor is there any express disposition of income previously paid to a grandchild who dies before the death of the last survivor of testator's wife and children. We are trying to ascertain the intention of the testator as to the disposition of income which became pay-

Opinion of the Court.

able to a grandchild who predeceased the survivor of testator's wife and children. We must also ascertain what his intention was as to who should share in the division of the estate upon the happening of the event authorizing its division, or at least we must ascertain whether or not it was the intention that a grandchild should take a vested remainder in both the income and corpus of the estate. This is what the court below held that Othello took. The language used as to the payment of a deceased child's share of the income to his or her children is that it shall be paid to such child or children "until the decease of the survivor of my said wife and children." This language, taken in connection with the fact that the will does not undertake to provide for the disposition of income being paid to a grandchild in the event of the death of such grandchild prior to the death of the survivor of the testator's wife and children, leads us to the conclusion that upon the death of a child of the testator leaving a child or children surviving such child or children took a vested remainder in the share of such child in the income of the estate and that upon the death of a grandchild to whom such a share was being paid the trustee would be bound to pay such share to the heirs of such grandchild until the death of the survivor of the testator's wife and children, or in the event such grandchild had assigned such share then to the assigns of such grandchild for the same period.

But the circuit judge awarded plaintiff four-fifths of the consideration received by the trustee for the land, one-fifth of which was evidently awarded upon the theory that Othello had a vested remainder in both the income and the corpus of the estate, which passed to the plaintiff by Othello's deed. We are unable to agree with the circuit judge in this respect. The title by the express language of the will is in the trustee together with the right

Opinion of the Court.

to sell the same and reinvest the proceeds entirely independently of the approval of the probate court or any authority whatsoever until the death of the survivor of the wife and children of the testator, at which time he provides that his estate shall be divided. There is no attempt on the part of the testator to designate the persons who shall at this time be entitled to participate in the distribution of his estate. But in order to prevent partial intestacy, if possible, the court will attempt to ascertain whom the testator intended to take his estate. It is clear that no character of title, either by way of remainder or otherwise, in any specific parcel of testator's property vested in any person other than the trustee during the life of the wife or any of the children of testator, otherwise the trustee could not sell as the will authorizes him to do. We are of the opinion and hold that the interest of Othello in the corpus of the estate was at most a contingent remainder contingent upon his surviving the last of testator's children, which he did not do. Othello's deed to plaintiff therefore passed to plaintiff no interest in the corpus of the estate.

The other three-fifths interest in the consideration received by the trustee for the lands involved which was awarded to the plaintiff was evidently awarded on the theory that this interest was acquired by the deed of Joshua, Josephine and Georgiana. They had no interest in the corpus of the estate and therefore could convey none.

The defendants other than the trustee have pleaded fraud and misrepresentation by plaintiff, alleging in substance that he fraudulently procured said deed to be executed by representing to them that they were only conveying to him their interest in property they had inherited from their mother, whereas in fact their deed to him conveyed also the lands devised by their father Joshua R.

Opinion of the Court.

Williams to W. R. Castle, trustee. Upon the trial some of the defendants testified that in negotiating with them plaintiff told them he wanted to buy the land inherited from their mother and that was all they agreed to sell him. Others never had any talk with him, having signed the deed, without reading it, at the request of one or more of their codefendants. Plaintiff denied having made such statements. The burden of proof on the issue of fraud is upon the party pleading it. *De Souza v. Soares*, 22 Haw. 17. On an appeal in an equity case the findings of fact by the circuit judge are not binding on the supreme court, but where the findings depend upon the credibility of witnesses and the weighing of conflicting testimony such findings are entitled to great weight. *Sumner v. Jones*, 22 Haw. 391. The finding of the circuit judge in this case upon the issue of fraud is upon conflicting testimony and will not be disturbed.

The plea which is relied upon to raise the issue of *res judicata* is by the defendant W. R. Castle, trustee, and alleges in substance that he was by decree of the probate court of date April 23, 1907, discharged as executor and his accounts as such executor up to December 30, 1906, approved, settled and adjusted and he as executor ordered to turn over the residue of the estate to himself as trustee; that in said accounts the income from said land and the proceeds thereof were accounted for and paid over to the sundry parties as beneficiaries under the will; that plaintiff had knowledge of the rendition of said final account and the settlement thereof and made no objection thereto; that the distribution was made in good faith among the devisees named in said will. Defendant suggests that it would be inequitable to compel him to account to plaintiff for said income paid over under order of the court.

The plaintiff asserts that this is not a plea of *res*

Opinion of the Court.

judicata and is not sufficient as a pleading to raise that issue. The doctrine of *res judicata* generally stated is that a fact or question which was actually and directly in issue in a former suit and was there judicially passed upon and determined by a domestic court of competent jurisdiction is conclusively settled by the judgment therein so far as concerns the parties to that action and persons in privity with them, and cannot be again litigated in any future action between such parties or privies in the same court or in any other court of concurrent jurisdiction upon the same or a different cause of action. (23 Cyc. 1215.)

It is not alleged that the plaintiff was a party to the probate proceedings nor is it alleged that he is in privity with any one who was a party thereto. The nearest such plea comes to alleging such facts is contained in the allegation to the effect that the plaintiff knew of the rendition of the final account and the settlement thereof and made no objection thereto. Whether plaintiff was a party to the probate proceeding is certainly a material fact in the determination of the question of whether he is bound thereby. A material fact, if not alleged, is presumed not to exist. (31 Cyc. 86.) We conclude that the plea falls short of raising the issue of *res judicata*.

To summarize our conclusions, we hold that the plaintiff is entitled, during the life of Joshua Williams, a son of the testator, to one-fifth of the income received by the trustee from apanas 1 and 2, L. C. A. 2043, R. P. 764, which were devised to him, and one-fifth of the income received by him from the undivided one-third interest in apanas 1 and 2, L. C. A. 2042, R. P. 762, conveyed to him as trustee by Opunui et al. from and after August 23, 1901, and one-fifth of the income received or which may be received by the trustee during the life of the said Joshua from the money received by said trustee for said

Opinion of the Court.

lands or any reinvestment thereof. The trustee had no authority to sell the undivided one-sixth interest in L. C. A. 2042, the title to which was vested in Kaaikaula Williams, deceased, and conveyed to the plaintiff by the deeds herein referred to. Even though the deed of the trustee to the Woodlawn Fruit Company purports to convey the undivided one-sixth interest in L. C. A. 2042 which was vested in plaintiff it was nevertheless ineffectual to accomplish that end so far as we are able in this proceeding to ascertain. Plaintiff would therefore have no interest either in the consideration received by the trustee for this undivided one-sixth interest in L. C. A. 2042 or the income derived from an investment thereof. Plaintiff is entitled, during the life of Josephine Boyd, a daughter of the testator, to a like proportion of the income as set out above, and also during the life of Georgiana Wright, another daughter of testator, to a like proportion of said income. By virtue of the conveyance of Othello Williams he is entitled to a like proportion of the income during the life of the last survivor of the three children above named.

The decree appealed from awarded plaintiff certain interest in the consideration received by the trustee for the lands sold to the Woodlawn Fruit Company. He is clearly not entitled to this, but in lieu thereof is entitled to the income arising therefrom. The trustee had the title to the estate, the right to sell it and to reinvest the proceeds paying the income to the designated parties until the death of the survivor of testator's wife and children. The trustee is liable to parties entitled to the income only for the amount actually received by him as income after deducting his expenses and commissions properly chargeable. Under these circumstances it was proper for the circuit judge to appoint, as he did, a master to take, make and report to the court the account of the income re-

Syllabus.

ceived by the trustee from the property and its proceeds as herein held to be payable to the plaintiff.

The cause is remanded with instructions to modify the decree to conform to the views herein expressed.

E. C. Peters (*Peters & Smith* on the brief) for plaintiff.

A. Withington (*Castle & Withington* on the brief) for W. R. Castle, Trustee.

W. B. Pittman (*Andreus & Pittman* on the brief) for defendants Kahalauaola Williams, Georgiana Wright, Joshua Williams, Josephine Boyd and Lydia Moldenhauer.

Marguerite K. Ashford for Henry Williams, Edward Williams, Georgiana Williams and Annie Spalding Fern.

JONAH KUMALAE *v.* DAVID KALAUOKALANI,
CLERK OF THE CITY AND COUNTY OF HONOLULU.

No. 1201.

MANUEL C. PACHECO *v.* DAVID KALAUOKALANI,
CLERK OF THE CITY AND COUNTY OF HONOLULU,

No. 1202.

APPEALS FROM CIRCUIT COURT, FIRST CIRCUIT.
HON. J. T. DEBOLT, JUDGE.

ARGUED JULY 5, 1919.

DECIDED JULY 5, 1919.

COKE, C. J., KEMP AND EDINGS, JJ.

ELECTIONS—*mandamus to compel issuance of certificate—defense.*

It is no defense to a *mandamus* proceeding to compel the can-

Opinion of the Court.

vassing officer to issue and deliver to petitioner a certificate of his election that one other than the petitioner has taken possession of and is holding the office for which petitioner sought a certificate of election.

OPINION OF THE COURT BY KEMP, J.

All of the questions presented by these appeals, with a single exception, were decided by us when the same cases were before us upon reserved questions and our opinion in those proceedings is here adopted as fully applicable to these appeals.

The new question here presented was raised by the refusal of the circuit judge to permit the respondent to amend his return so as to show that after the decision upon reserved questions and before the peremptory writ had been issued others than petitioners had taken possession of and were holding the offices for which they sought certificates of election.

In an oral decision rendered at the hearing we held that the action of the trial judge in refusing to allow the amendment constitutes no error and ordered the peremptory writs to issue from this court.

All that was said in our former opinion as to this not being a trial of the title to the office has direct application to this question and demonstrates that the circuit judge properly refused to grant respondent's request for permission to amend his return so as to show that fact. *Elisha Strong, Petitioner*, 20 Pick. (Mass.) 484-496.

The orders appealed from are affirmed.

Watson & Clemons, Perry & Mattheurman and *C. M. Hite*, on the brief for petitioners.

C. H. Olson (Castle & Withington and *Robertson & Olson* on the brief) for respondent.

Syllabus.

OPINION OF COKE, C. J., DISSENTING IN PART AND CONCURRING IN PART.

I concur in the majority opinion of this court disposing of the single new question presented by the appeals of respondent. The request addressed to the circuit judge by the respondent for permission to amend his return so as to show that after the decision upon the reserved questions and before the peremptory writ had been issued others than petitioners had taken possession of, and were holding, the offices for which petitioners sought certificates of election was properly denied by the circuit court.

The other questions involved in these appeals have been disposed of in *Kumalae v. Kalauokalani* (No. 1195) and *Pacheco v. Kalauokalani* (No. 1196), ante p. 1, where my views, to which I adhere, are expressed.

IN THE MATTER OF THE ESTATE OF JAMES B.
CASTLE, DECEASED.

No. 1175.

APPEAL FROM CIRCUIT JUDGE, FIRST CIRCUIT.

HON. C. W. ASHFORD, JUDGE.

ARGUED JUNE 17, 1919.

DECIDED JULY 5, 1919.

COKE, C. J., KEMP AND EDINGS, JJ.

DOWER.

Under Sec. 2977 R. L. 1915 the widow is entitled to one-third part of the movable effects in possession or reducible to possession of her husband at the time of his death after the payment of his just debts.

Opinion of the Court.

SAME.

The term "movable effects in possession or reducible to possession" is less comprehensive than the phrase "personal property."

SAME—*life insurance*.

The proceeds of policies of insurance upon the life of the husband which were made payable to his executors, administrators or assigns and collected by them subsequently to his death were not his movable effects in possession or reducible to possession at the time of his death and the widow possesses no dower right therein.

OPINION OF THE COURT BY COKE, C. J.

James B. Castle died at Honolulu in the year 1918 and left an estate of the value of about \$600,000 which was disposed of by the will of the deceased which was duly admitted to probate. The deceased carried insurance policies payable to his executors, administrators or assigns and from which the executors received the sum of \$53,870. By the provisions of the policies of insurance the insured reserved the right to change the beneficiary at any time provided the policy was not then assigned. The deceased left surviving him a widow, Julia White Castle, and his son, Harold K. L. Castle, both of whom were provided for in the will. Mrs. Castle, the widow, waived her rights under the will and elected to take her dower right as provided by statute, and property of the value of \$181,250 was assigned to her. Upon the hearing of the final accounts of the executors of the will the circuit court ordered one-third of the aggregate net amount collected by the executors upon the policies of life insurance carried by the deceased paid to the widow as part of her dower. From this order the executors have appealed to this court.

The question involved is whether a widow is entitled by way of dower to any part of the proceeds of an insurance policy upon the life of her deceased husband payable to

Opinion of the Court.

his executors, administrators or assigns. To determine this question it is necessary to construe the meaning and intent of section 2977 R. L. 1915 which is as follows:

“Every woman shall be endowed of one-third part of all the lands owned by her husband at any time during marriage, in fee simple, in freehold, or for the term of fifty years or more, so long as twenty-five years of the term remain unexpired, but in no less estate, unless she is lawfully barred thereof; she shall also be entitled, by way of dower, to an absolute property in the one-third part of all his movable effects, in possession, or reducible to possession, at the time of his death, after the payment of all his just debts.”

The common law right of dower entitled the wife to a life estate in one-third of all the lands and tenements of which the husband was seized of an estate of inheritance at any time during coverture. It is to be noted that by the provision of our statute the right of the widow has been extended beyond the common law to the extent that she acquires an absolute property in one-third of her husband's movable effects in possession or reducible to possession at the time of his death after the payment of his just debts.

The appellee argues that the term “movable effects in possession or reducible to possession,” as the term is used in the statute, is equivalent to “personal property.” Property is grouped into two general classes, to wit, personal property and real property and if the contention of appellee is sound the conclusion necessarily follows that a widow is entitled by way of dower to an interest in all of the real and personal property of her deceased husband. The statute in our opinion does not extend that far. In a prior decision of this court it is clearly indicated that in some classes of personalty the widow enjoys no dower interest. In *Trustees Ena Estate v. Ena*, 18 Haw. 588, the following language is employed:

Opinion of the Court.

“Debts of a solvent estate should be paid from cash, but if that is insufficient *the personalty in which the widow has no dower interest* should be sold first.” And again in the same opinion: “The widow’s dower in the movable effects of her husband is subject to the payment of all his just debts, provided the cash *and nondowable personalty* are insufficient.” A contract of life insurance is a mutual agreement by which one party undertakes to pay a given sum upon the happening of a particular event contingent upon the duration of human life in consideration of the payment of a smaller sum immediately or in periodical payments. The right to the amount due upon the policy does not come into existence until after the death of the insured. The money belongs to the insurer who is charged with the duty created by the contract to pay the beneficiaries. The only thing which the insured can grant is an interest in the contract. See *Tyler v. Treasurer and Receiver General*, 115 N. E. 300. In *re Estate of Alexandre*, 19 Haw. 551, the question reserved was whether the proceeds of a contract of insurance in a mutual benefit association which the deceased prior to his death had directed should be paid to the executor of his will for the benefit of the estate were part of the estate of the deceased and whether the widow had a dower interest therein, etc., and the court held that the widow was only entitled to dower in the movable effects in possession or reducible to possession and that the money in question was not personal property of the deceased nor a part of his movable effects in possession or reducible to possession, for which reason the widow was excluded from any right therein. An early and well considered case upon this subject is *Strong v. White*, 19 Conn. 238. The question there involved was whether where a testator bequeathed to his son all his movable property that he should die possessed of included a judgment debt which existed in favor of the

Opinion of the Court.

testator at the time of his death. In that opinion the court says: "The adjective 'movable' applied to property signifies in its ordinary and proper sense that which is capable of being moved or put out of one place into another. It therefore necessarily implies that such property has an actual locality and is susceptible of locomotion or a change of place. * * * It is however insisted that the word 'movable' applied as an epithet to property is equivalent to the word 'personal,' and in support of this claim we are referred to Blackstone. This position, however, so far from being supported, is discountenanced by that writer. * * * He did not deem the phrases 'movable property' and 'personal property' to be equivalent, but on the contrary considered movable property to be only one of the several species of personal property." See also 2 Bouvier's Law Dict. 2266 and *Sullivan v. Richardson*, 14 So. 692, 709.

We think it is plain that the proceeds of the policies of insurance upon the life of Mr. Castle which were made payable to his executors, administrators or assigns and collected by them subsequently to his death, were not his movable effects in possession or reducible to possession at the time of his death and that the widow possesses no dower right therein.

The order appealed from is reversed and the cause remanded to the court below for proceedings consistent with this opinion.

A. Withington (Marguerite K. Ashford with him on the brief) for the appellants.

F. M. Hatch for the appellee.

Syllabus.

THE FIRST BANK OF HILO, LIMITED, *v.* C. K. MAGUIRE AND SOLOMON LALAKEA, ADMINISTRATOR OF THE ESTATE OF T. K. LALAKEA, DECEASED.

No. 1161.

ERROR TO CIRCUIT COURT, FOURTH CIRCUIT.
HON. C. K. QUINN, JUDGE.

SUBMITTED MAY 3, 1919.

DECIDED JULY 7, 1919.

COKE, C. J., KEMP AND EDINGS, JJ.

ASSIGNMENTS—*public officers—salaries.*

An assignment by a public officer of his unearned or anticipated salary is void as being against public policy.

COMPROMISE AND SETTLEMENT.

The compromise of a suit neither admits the validity of the claim urged nor ascertains any amount as being due and amounts to no more than saying that so much is paid to be rid of the controversy.

OPINION OF THE COURT BY EDINGS, J.

This case is before the court upon a writ of error to review a judgment entered in favor of the defendant Solomon Lalakea, administrator of the estate of T. K. Lalakea, deceased, in the circuit court. The facts show that the action was one of assumpsit on a promissory note for \$185 made and executed by the defendant C. K. Maguire and T. K. Lalakea to the plaintiff; that although the defendant Maguire was joined as a party defendant he was not served with process and did not appear; that H. V. Patten was the cashier and treasurer of the plaintiff corporation in December, 1907, and had charge of its business at that time; that on December 18, 1907, defendant Maguire applied to Patten, as cashier and manager of

Opinion of the Court.

the said bank, for the loan of \$185, stating as a reason that certain policemen wanted advances on their salaries for that month, i. e., December, totaling this amount, to which application Patten consented and stated that the bank would loan the amount upon a note to be executed by Maguire and T. K. Lalakea; that the loan was thereupon made, Maguire received the money and the note was signed thereafter by Maguire and Lalakea; that at this time T. K. Lalakea and Maguire were respectively treasurer and auditor of the County of Hawaii; that the said note contained the following clause:

“For the purpose of securing the payment of our Promissory Note of the above date in favor of The First Bank of Hilo, Ltd., when due, and the interest that may accrue thereon, we do hereby assign, transfer and set over, and herewith deliver, to the said First Bank of Hilo, Ltd., and assigns, the following:

“Salary	J. W. Kuaimoku	December 31, 1907	45.00
”	Y. K. Kaapa	” ” ”	35.00
”	K. Kawelu	” ” ”	35.00
”	K. Kupuna	” ” ”	35.00
”	G. Kauwe	” ” ”	35.00

185.00;”

that “about the end of the month” Maguire brought to the bank an order, drawn in favor of the First Bank of Hilo, Ltd., on the treasurer of the County of Hawaii, signed by himself as auditor of the County of Hawaii, made out upon a blank of the form adopted for county warrants, and being for the sum of \$185, the amount of the loan, which was accepted by the bank, “Bills receivable” was credited with the amount in the books of the bank, and the note stamped “paid” and delivered to Maguire; that the bank did not have any claim against the County of Hawaii in December, 1907, or in January, 1908; that no other payment of the note in question has

Opinion of the Court.

ever been made; that the bank had possession of the note at the time this action was brought, having received the same from R. W. Breckons, Esq., who was at the time he delivered the note to the bank acting as special counsel for the County of Hawaii; that no interest has ever been paid on this note except the interest for December, 1907, which was deducted from the loan in advance; that the policemen whose salaries Maguire and Lalakea assigned or attempted to assign to the bank as security for the loan never at any time made any direct assignment to the bank; that the process of cashing county warrants by the bank, including the warrant in question, No. 2071, was as follows: Warrants were handed in to the bank (in this case by Maguire) the same being regarded as cash by the bank, and entries made in the books of the bank, the warrants were taken by a clerk of the bank to the treasurer of the County of Hawaii, who issued a single check for all the warrants that were brought to him at any one time, said check being drawn payable to the First Bank of Hilo, and against an account standing in the name of T. K. Lalakea, treasurer of the County of Hawaii; that defendants' exhibit "3" namely, a check for \$4,906.94, was drawn and disposed of in this manner and included the amount of warrant No. 2071; that in October, 1913, a demand was made upon the bank by the County of Hawaii for the sum of \$56,723.20, the same being the sum total of a number of warrants, a list of which was attached to the demand, which had been drawn, payable to the bank, by Maguire, and which warrants were claimed by the county to be illegal and which had been handled by the bank in the manner above described and which included the warrant in question; that this demand was followed by some negotiations, as a result of which an agreement of compromise was entered into which recites in substance "that during a period

Opinion of the Court.

covering from the month of January, 1907, to the month of June 1912, one Charles K. Maguire, was the duly elected, qualified and acting auditor of the County;" that "during the said period the said Charles K. Maguire, auditor as aforesaid, did issue divers warrants directed to the treasurer of the County of Hawaii in favor of the said bank, a list of which said warrants * * * is * * * hereto attached and made a part hereof, all of which said warrants were fraudulently and illegally drawn and were in payment of claims and demands not chargeable against the said County; and the said bank in good faith, from time to time, presented the said fraudulent and illegal warrants to the county treasurer in the regular course of business and received therefor from the treasurer money belonging to the County of Hawaii, and the County has now demanded repayment of all of said money and has threatened to commence an action at law for the recovery of the same; and there now exists between the County and the said bank a difference of opinion concerning the liability of the bank to the County but said parties have undertaken to make an amicable adjustment of questions of law and fact existing under the transaction aforesaid and have finally concluded to accept an agreement whereby the bank shall pay and the County shall receive the sum of money hereinafter named and thereby the County shall release the bank from any and all liability on account of the transactions aforesaid. Now, therefore, the County in consideration of the premises and of the receipt of Forty Thousand Dollars (\$40,000) received from the bank, the receipt whereof is hereby acknowledged, has released and does hereby release and forever discharge the said bank from the further payment of any money on account of any demand, right or claim now or hereafter coming due to the County from or on account of the unlawful or fraudulent draw-

Opinion of the Court.

ing of any of the said warrants by the said Charles K. Maguire, acting as auditor as aforesaid, and on account of paying of said warrants;" and the County further covenanted with the bank to institute any suit or action for and on behalf of the County against any persons "to be designated by the bank to recover such sum as may now or hereafter become due to the County from the fraudulent or unlawful drawing of any warrant by the said Charles K. Maguire" and that any and all sums recovered by the County should be paid over to the bank; that the said agreement was duly executed on the 30th day of October, 1913, by the bank and by the County; that of said amount of \$40,000 the bank received from the bondsmen of Maguire \$2,712.75, leaving the actual amount which the bank expended in this compromise \$37,287.25; that since the date of settlement with the County no charge against Maguire and Lalakea, or either of them, under the head of "Bills receivable," or otherwise, has been entered in the books of the bank, but an entry of \$40,000, under the head "Bills receivable" has been made; that individual warrants were issued by the auditor to the several policemen whose salaries had been attempted to have been assigned by Maguire and Lalakea, for their respective salaries for December, 1907, demands for the same having been made by the policemen upon forms adopted for that purpose and allowed by the board of supervisors and paid by county warrants which were cashed by the bank; that the check given by the treasurer to take up the warrant for \$185 and other warrants was drawn on the "General Fund," this being a checking account, maintained through the deposit of the treasurer of territorial warrants received from the treasurer of the Territory under certain statutory provisions; that C. K. Maguire and T. K. Lalakea are both dead; that Solomon Lalakea is the duly appointed, qualified and act-

Opinion of the Court.

ing administrator of the estate of the said T. K. Lalakea, deceased.

The plaintiff in error contends among other things "that Maguire and Lalakea executed a collateral assignment of what purported to be the wages of five officers. This was only an incident to the entire transaction and was not even a principal incident. * * * The assignment of the salaries was only secondary and collateral to the principal undertaking." This theory is mischievous and fallacious. The assignment of the salaries by Maguire and Lalakea was the sole excuse or justification advanced by the bank for receiving from the auditor a county warrant drawn in its favor for any purpose when it knew that the County was not indebted to it in any amount, and they certainly would not have been relieved from responsibility because the unauthorized warrant was drawn to pay Maguire's individual indebtedness. A very superficial knowledge on the part of the bank of business transactions of this nature would have enabled it to detect the fraud and possibly to have put a stop to this long line of embezzlements in their incipency.

That these attempted assignments of the unearned salaries of the five policemen were illegal, null and void does not admit of argument, the general principle being well expressed in the following citation, supported by numerous decisions in the United States and in England:

"It is well settled both in England and the United States that a public officer cannot assign by anticipation the salary and fees paid to him for the purpose of maintaining the dignity of his office and securing the due discharge of its duties. * * * The protection thus extended to those engaged in the performance of public duties is not based upon the ground of their private interest, but upon the necessity of securing the efficiency of the public service by insuring that the funds provided for its maintenance shall be received by those who are to perform the

Opinion of the Court.

work, at the periods appointed for their payment. The assignment of such funds before they are due impairs the efficiency of the public service, and is void both in law and equity as being against public policy." 2 A. & E. Ency. L. 1033.

When the plaintiff in error accepted this warrant No. 2071 it took what it knew to be an order upon the treasurer of the County of Hawaii for the alleged interest in the salaries of the officers assigned to it by Maguire and that it could not have any interest in these salaries except by virtue of the assignment by Maguire and Lalakea and it, the plaintiff in error, accepted it (warrant No. 2071) with presumptive knowledge that the assignment by which they acquired possession of it was void as against public policy. This warrant they received in payment of the note sued upon and afterwards converted the warrant into cash. This constituted payment of the note and extinguished the bank's right to maintain a suit upon said note.

Further—upon the 30th day of October, 1913, the plaintiff in error and the County of Hawaii entered into the agreement herein set forth. This agreement was unquestionably a compromise in the fullest legal sense. "Compromise has been defined as an agreement between two or more persons who, to avoid a lawsuit, amicably settle their differences upon such terms as they can agree upon." 6 A. & E. Ency. L. 418. "The compromise of a suit neither admits the validity of the claim urged, nor ascertains any amount as being due, and amounts to no more than saying that so much is paid to be rid of the controversy." 12 C. J. 339. "An offer by a party to pay a sum of money by way of compromise of an existing controversy is not to be used as evidence against him. * * * The reason why the mere offer of money or other thing by way of compromise is not to be evidence against him who makes it is very plain and easily understood.

Opinion of the Court.

Such an offer neither admits nor ascertains any debt and is no more than saying that so much will be given to be rid of the controversy." *Sanborn v. Neilson*, 4 N. H. 501. "An entire claim may be paid to avoid a lawsuit, the payer intending to admit nothing but his desire for peace, the claimant understanding that nothing else is admitted and both parties believing that the payer is not liable, or having no opinion on the subject." *Colburn v. Groton*, 22 L. R. A. 763.

In the compromise under discussion there was a concession by the bank to the County of the amount of \$40,000, and there was a concession from the County to the bank of the difference between \$40,000 and the claim of \$56,723.20, but there was no admission by either side that there was any merit in the legal contentions of the other or any agreement as to the facts claimed to be involved. This agreement of compromise was a contract which superseded the preexisting claim, whether such claim was valid or invalid, and when payment was made it was a payment of the contract of compromise and not of the preexisting obligation, or alleged obligation, or of any portion thereof. We are unable to discover any process by which it can be legally deduced that the amount paid by the bank to the County paid any of these illegal warrants or that these warrants were ever adjudged illegal in any action instituted by the County against the bank.

There are other questions in the case but we deem the foregoing reasons sufficient to show that the judgment must be affirmed.

The judgment is affirmed.

Carlsmith & Rolph for plaintiff in error.

W. H. Smith and Peters & Smith for defendant in error Solomon Lalakea.

Syllabus.

IN THE MATTER OF THE APPLICATION OF T. BRANDT FOR A WRIT OF MANDAMUS AGAINST J. MAHIAI KANEAKUA, COUNTY CLERK OF THE COUNTY OF KAUAI, TERRITORY OF HAWAII.

No. 1190.

MOTION TO DISMISS APPEAL.

SUBMITTED JULY 9, 1919.

DECIDED JULY 9, 1919.

COKE, C. J., KEMP AND EDINGS, JJ.

COURTS—opinions on moot questions.

An appellate court will not give opinions on moot questions or abstract propositions or declare principles or rules of law which cannot affect the matter in issue.

On May 31, 1919, T. Brandt, of Waimea, County of Kauai, made application by petition to the judge of the circuit court of the fifth judicial circuit for a writ of mandamus to compel the appellant, J. Mahiai Kaneakua, county clerk of the County of Kauai, Territory of Hawaii, to cause the name of said T. Brandt to be, as a candidate for the office of supervisor for the district of Waimea, printed on the official ballots for the county election to be held in said county on June 3, 1919. An alternative writ of mandamus was issued on the morning of May 31 and made returnable at three o'clock in the afternoon of that day. The county clerk filed his return to the writ and after a hearing on the petition the peremptory writ was made permanent and was served upon the county clerk on June 2, 1919. On June 4, 1919, the day following the election, the county clerk filed his return to the peremptory writ showing thereby that said writ had been duly executed and that he had fully com-

Opinion of the Court.

plied with the mandates thereof. The county clerk has, however, perfected an appeal to this court. Petitioner Brandt has interposed a motion to dismiss the appeal of the county clerk on the ground "that the controversy between the parties has ceased to exist and there is no subject-matter upon which a judgment of this court could operate."

Per Curiam: The election had been held and the writ satisfied before the cause reached this court and it follows that even should the appellant prevail here any judgment that he might obtain would be an empty one, and, as said in *People v. Stevens*, 152 Ill. App. 118, "By reason of the occurrence of the election the rights sought to be enforced by the petitioners have become abstract only, and a determination of the same at this time can be of no substantial or practical benefit to them." An appellate court will not give opinions on moot questions or abstract propositions or declare principles or rules of law which cannot affect the matter in issue in the case before it. Accordingly, in reviewing a decision upon an application for a writ of mandamus the judgment of the lower court will not be disturbed where by some change of circumstances since the commencement of the suit the questions litigated and determined below have ceased to be of any practical importance but are academic merely.

If, as claimed by the county clerk, a person other than Mr. Brandt was in fact elected to the office of supervisor of the district of Waimea at the primary election held on May 17, 1919, such person may assert his right to the office by *quo warranto* or other appropriate proceeding.

The motion to dismiss the appeal is granted.

P. L. Rice for the motion.

S. K. Kaco, County Attorney of Kauai, contra.

Memorandum Opinion.

**HAWAIIAN PINEAPPLE COMPANY, LIMITED, A
CORPORATION, *v.* MASAMARI SAITO AND
LIBBY, McNEILL & LIBBY OF HONOLULU,
LIMITED, A COPORATION.**

No. 1135.

**PETITION FOR APPEAL TO THE UNITED STATES CIRCUIT
COURT OF APPEALS FOR THE NINTH CIRCUIT.**

FILED JULY 3, 1919.

DECIDED JULY 14, 1919.

BEFORE COKE, C. J., AT CHAMBERS.

MEMORANDUM OPINION.

In the above entitled cause a decree was on July 3, 1919, entered in favor of the respondents Masamari Saito and Libby, McNeill & Libby of Honolulu, Limited, and against the complainant Hawaiian Pineapple Company, Limited, setting aside the permanent injunction issued out of the court below against the said respondents and instructing said court to dismiss complainant's bill of complaint, etc., and the complainant Hawaiian Pineapple Company, Limited, has presented to me a petition for an appeal from said decree to the United States circuit court of appeals for the ninth circuit. The petition is accompanied by assignments of error on appeal and affidavits which purport to show that the amount involved in the cause exclusive of costs exceeds the value of \$5000. The respondents have interposed a demurrer to the petition for appeal, the burden of which is that the complainant has failed to show that the amount involved in the controversy exceeds the sum of \$5000 and for which reason the court of appeals would be without jurisdiction and the petition for appeal should therefore be disallowed. The question has been fully and ably presented

Memorandum Opinion.

by each side by both oral argument and the citation of a vast number of authorities.

Without any attempt to discuss the question or to review the authorities cited I hold that the petitioner by its affidavits has shown with sufficient certainty that the amount involved in the cause exclusive of costs exceeds the sum of \$5000 and that complainant is therefore entitled to an appeal from said decree of this court to the United States circuit court of appeals. I shall therefore allow the appeal, but during the pendency thereof and by virtue of Rule 74 of the rules of practice for courts of equity of the United States promulgated by the Supreme Court of the United States November 4, 1912, I shall restore the permanent injunction issued out of the court below, which was by decree of this court of July 3, 1919, vacated and set aside as aforesaid, unless the respondents forthwith file herein a bond in such form and amount and with such surety or sureties as I may approve conditioned to reimburse the complainant for any and all damages which it may sustain by reason of the premises in the event it shall prevail in the United States circuit court of appeals.

U. E. Wild and E. C. Peters (Frear, Prosser, Anderson & Marx and Peters & Smith on the brief) for complainant.

J. W. Cathcart and B. S. Ulrich (Thompson & Cathcart on the brief) for respondents.

Syllabus.

TERRITORY *v.* FREDERICK ANDERSON.

No. 1181.

TERRITORY *v.* FREDERICK ANDERSON AND J. S. AZEVEDO.

No. 1182.

TERRITORY *v.* FREDERICK ANDERSON.

No. 1183.

MOTIONS TO QUASH WRITS OF ERROR.

ARGUED JULY 9, 1919.

DECIDED JULY 19, 1919.

COKE, C. J., KEMP AND EDINGS, JJ.

INDICTMENT AND INFORMATION—*motion to quash indictment and a special plea in bar distinguished.*

A motion to quash an indictment is addressed to the discretion of the court and is usually based upon matters of record. A special plea in bar presents some matter extrinsic of the record which completely bars the proceeding and in regard to which the court may exercise no discretion but is bound to sustain the plea if it be well taken.

APPEAL AND ERROR.

The Territory is not entitled to a writ of error to review a judgment sustaining a motion to quash an indictment.

OPINION OF THE COURT BY COKE, C. J.

In each of the above cases an indictment was returned by the grand jury of the first judicial circuit against the defendant Anderson and to each of said indictments Anderson by his attorneys, Messrs. Thompson & Cathcart, appeared and interposed a motion to quash. These motions were based upon identical grounds, to wit: (1)

Opinion of the Court.

that the grand jury had previously acted upon the facts and had returned no bill and that subsequently thereto without an order of court directing them or permitting them so to do had reconsidered the same facts and had returned the indictment now before the court; (2) that the indictment found as aforesaid was found on the urgent request of, and after argument and solicitation by, the deputy attorney general of the Territory; (3) that the evidence was insufficient to justify a finding of a true bill and that the grand jury accepted the report of a committee of its members on the subject. The circuit court granted the motions upon the first ground assigned and all three indictments were quashed. The Territory has caused to be issued out of this court writs of error to the circuit court to review the decisions upon the motions to quash the indictments and the judgments entered thereon. The defendant Anderson by his attorneys now presents to this court in each of said causes a motion to quash the writ of error for the following reasons: (1) that it affirmatively appears from the assignments of error duly made and filed by the first deputy attorney general that no writ of error may be taken by and on behalf of the Territory to this court in the above entitled matter; (2) that it affirmatively appears that the writ of error issued as aforesaid in the above entitled matter was issued contrary to the provisions of section 2520 of the Revised Laws of the Territory of Hawaii, 1915, wherein is set forth and provided in what cases a writ of error may be taken by and on behalf of the Territory in criminal cases, and (3) that it affirmatively appears from the assignments of error made and filed as aforesaid that the judgment of the court below was a judgment quashing the indictment theretofore found against the above named defendant and that it further appears that said decision and judgment of the court below was in no sense based

Opinion of the Court.

upon the invalidity or construction of the statute upon which the indictment or charge was founded. The statute above referred to and which allows the Territory a writ of error in criminal cases under certain circumstances reads as follows:

“A writ of error may be taken by and on behalf of the Territory from the district or circuit courts direct to the supreme court of the Territory in all criminal cases, in the following instances, to wit:

“From a decision or judgment quashing, setting aside, or sustaining a demurrer to, any indictment or any count thereof, or any criminal charge, where such decision or judgment is based upon the invalidity or construction of the statute upon which the indictment or charge is founded.

“From a decision arresting a judgment of conviction for insufficiency of the indictment or charge, where such decision is based upon the invalidity or construction of the statute upon which the indictment or charge is founded.

“From a decision or judgment sustaining a special plea in bar, when the defendant has not been put in jeopardy.”

As the decisions of the circuit court clearly do not fall within the scope of paragraphs 2 and 3 of the section above quoted the Territory must sustain its right to the writs of error, if at all, under the fourth paragraph, and to determine whether that ground is tenable it remains only to ascertain whether the motions to quash the indictments which were sustained by the circuit court can be deemed to be special pleas in bar.

There is a recognized distinction between a motion to quash an indictment and a special plea in bar. The former is addressed to the discretion of the court and is usually based upon matters of record though it would appear that the court may in proper circumstances aid the exercise of its discretion by looking into what is brought to its attention outside the indictment and even

Syllabus.

outside of the record. This mode of attack upon an indictment is closely akin to a plea in abatement, the two terms sometimes being used interchangeably. A special plea in bar ordinarily presents some matter extrinsic of the record which completely bars the proceeding, such, for instance, as a plea of insanity, a plea of pardon, or a plea of former acquittal, conviction or jeopardy, in regard to which the court may exercise no discretion but is bound to sustain the plea if it be well taken. 1 Bishop's New Criminal Procedure Secs. 734-848.

In the present cases the attack upon the indictments was based upon the proceedings which took place in the court wherein the indictments were returned and presented matters which could not properly have been incorporated in a special plea in bar. For this reason the Territory was not entitled to the writs issued out of this court and the motions to quash the same are hereby granted and the writs are dismissed.

J. W. Cathcart and B. S. Ulrich for the motions.

J. Lightfoot, First Deputy Attorney General, contra.

JAMES T. TAYLOR *v.* CITY AND COUNTY OF HONOLULU BY A. M. BROWN, CITY AND COUNTY ATTORNEY, AND D. L. CONKLING, CITY AND COUNTY TREASURER.

No. 1160.

APPEAL FROM CIRCUIT JUDGE, FIRST CIRCUIT.

HON. C. W. ASHFORD, JUDGE.

ARGUED JUNE 18, 1919.

DECIDED JULY 23, 1919.

COKE, C. J., KEMP AND EDINGS, JJ.

MUNICIPAL CORPORATIONS.—*public improvement—contract.*

Allegations of slight variances from specifications which do not

Opinion of the Court.

affect the character of the work are not facts sufficient to establish fraud in the performance of a contract of such a nature as to warrant the intervention of a court of equity and the granting of an injunction to restrain the collection of the assessment.

SAME—same—assessment.

An assessment will not as a rule be set aside for minor irregularities that in no way affect substantial rights of property owners.

SAME—same—same—conclusiveness.

Where a city is vested with power to determine what property is benefited by a local improvement and to assess the cost upon such property, its decision is conclusive except in case of fraud or mistake.

SAME—same—contract—acceptance.

The acceptance of the contract by the engineer and by the board of supervisors must in the absence of fraud be regarded as conclusive.

SAME—same—assessment—constitutionality.

Neither the relative importance of the work to the value of the land assessed nor that the assessment is unequal as regards the benefits conferred is a matter in which the local authorities are controlled by the Federal Constitution.

OPINION OF THE COURT BY EDINGS, J.

This is an interlocutory appeal from an order and decree of the first judge of the circuit court of the first circuit, sitting in equity, overruling the demurrer of the respondents to the amended bill of the complainant, said amended bill having been filed by leave of court after a demurrer had been sustained to the original bill. The amended bill recites in substance that complainant is the owner in fee of certain premises in the Puiwa district in Honolulu, abutting on Laimi and Park roads, described as lots 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, shown on a corrected map of frontage improvement district number 7, Laimi, Park and Puiwa roads, dated November 26, 1917; that prior to the 17th day of October, 1917, the board of supervisors of the City and County of Honolulu determined

Opinion of the Court.

upon and proceeded with the improvement of Laimi, Park and Puiwa roads under an improvement known as frontage improvement district number 7; that on the 18th day of October, 1917, a resolution was duly adopted by the board of supervisors of the City and County of Honolulu whereby a contract was awarded to one John Duggan for the improvement of said roads and the construction of concrete roads, drainage systems and curbing along the property lines of the abutting owners, including complainant; that previous to the awarding of said contract the said John Duggan had entered upon the premises aforesaid and had begun the work of improving said streets and thereafter a contract was signed by the officers of the City and County of Honolulu for the completion of said improvements in accordance with certain plans and a certain contract and specifications made a part of said bill; that thereafter and in purported pursuance of the terms of said contract the said John Duggan began to build said Park and Laimi roads, but notwithstanding the terms of said contract and of said specifications the said John Duggan carried on the work of constructing said roadway on said Park road negligently, unskilfully, fraudulently and in entire disregard of said contract and said plans and specifications in the following particulars, to wit: "(a) by violating the terms of paragraph 42 of said specifications, whereas said paragraph requires the contractor to incorporate not less than six (6) bags of cement in every cubic yard of concrete, the said John Duggan used and incorporated in a stretch of concrete roadway of about eleven hundred (1100) feet on said Park road in front of the lots of complainant aforesaid, less than five and one-half ($5\frac{1}{2}$) bags of cement to each cubic yard of concrete as there laid; that the roadway so constructed is of a quality greatly inferior to that prescribed by said contract and

Opinion of the Court.

specifications and of greatly less value and greatly less permanent;" (b) by violating a clause of said specifications requiring the subgrade to be at least five inches below the finished surface and that the subgrade when rolled should be not less than three-fourths of an inch below or one-fourth of an inch above true grade, the said subgrade when rolled on Park road in front of said lots of complainant is in certain places $4\frac{1}{2}$ inches and in other places $6\frac{1}{2}$ inches below the finished surface of the pavement, thereby materially diminishing the strength, durability and permanency of said pavement from that required by the contract; (c) by violating the provisions of said specifications which require the construction of a template or "strike-board" to be straight and rigid, the said John Duggan so negligently, unskilfully and fraudulently constructed and used such strike-board that the same was not straight or rigid, and by the use and manipulation thereof, and with the fraudulent intent not to comply with said specifications, was able to reduce the thickness of the concrete pavement in front of the lots of complainant from five inches, as required by said specifications, to four inches, thereby materially diminishing the strength, durability and permanency of said pavement; (d) by violating the provisions of said specifications by incorporating in said concrete roadway in front of the lots of complainant a substantial number of bags of cement which were defective and had been previously condemned by the inspector of the City and County of Honolulu as unfit for use; (e) by violating the terms of said specifications relating to curbing, the same as put in being of inferior quality as to material and so negligently and carelessly laid that many of the cement joints are already badly cracked; (f) by violating the terms of said specifications which require that the surface of the concrete when laid should be kept continuously wet and completely pro-

Opinion of the Court.

tected from the sun by canvas covered frames; (g) by violating the terms of said specifications by not providing a planking upon which the material could be dumped before being incorporated in said roadway; that complainant on or about the 27th day of October, 1917, duly protested in writing against the methods being pursued by the said John Duggan and duly called the attention of the city and county engineer to such methods, and on the 27th and 31st days of October, 1917, with the said engineer complainant visited the premises where the work was being done by the contractor at that time and there pointed out to said engineer the particulars wherein the said contractor was violating the terms of the contract, but the said city and county engineer wilfully and negligently failed, neglected and refused to stop the work of the said contractor or to require him to live up to his said contract in the particulars aforesaid; "that in consequence thereof, and by reason of the failure of the board of supervisors of the City and County of Honolulu through their agent, the city and county engineer, to require the said John Duggan to comply with the terms of his said contract, and by their permitting the said John Duggan to continue his work while constantly and persistently violating the terms of said contract, the work and material done and supplied, in the alleged performance of said contract, and the constructing of the finished pavement or roadway were materially defective in quality, strength, durability and permanency and greatly inferior in value to the pavement or roadway called for by said contract;" that on or about the 29th day of January, 1918, the said contractor claimed to have completed and carried out the terms of his said contract in all respects and thereupon the city and county engineer reported to the board of supervisors that the work under the terms of said contract was 90% completed, and that the con-

Opinion of the Court.

tractor should be paid 90% of the amount due him under the terms of said contract; "that upon the date and at the time said report was made, complainant duly protested to said board of supervisors of the City and County of Honolulu against the acceptance of any portion of the work claimed to have been done under said contract and against the payment of any portion of the consideration of said contract on the ground that the same had not been carried out in accordance with its terms, but, notwithstanding said protest and in violation and in fraud of the rights of the complainant the said board of supervisors accepted the report of the city and county engineer and paid 90% of the consideration set forth in said contract to the said contractor;" that thereafter a certificate was filed with said board of supervisors by said engineer certifying that the work under said contract had been completed and that the contractor was entitled to be paid the balance of the consideration named in said contract; that complainant duly protested against the acceptance of said work on the same grounds hereinbefore set forth and that notwithstanding said protest the said work was accepted and the balance of the consideration named in said contract was paid to the contractor; that on the 29th day of January, 1918, notice was given by said board of supervisors of the total cost of the improvements in said frontage improvement district and that a public hearing would be had on the 12th day of February, 1918, when the said board of supervisors would sit as a board of equalization to receive complaints or objections respecting the total amounts and that at such hearing complainant duly protested against said proposed assessment on the ground that the work of the contractor had not been carried out in accordance with the terms of his contract and that the assessment as proposed was not just or equitable and was in excess of the

Opinion of the Court.

special benefits accruing or to accrue by reason of the improvement to his property; that said protest was ignored and denied by said board of supervisors; that thereafter an ordinance was introduced providing for the cost of said improvements, to the passage of which by said board of supervisors complainant duly protested, but notwithstanding said protest said ordinance was passed, adopted and approved; that the said board of supervisors illegally and without authority of law and in violation of the rights of complainant fraudulently permitted said contractor to begin, carry on and complete said paving negligently, unskilfully and in entire disregard of the terms of said contract in the particulars above enumerated, and caused to be issued a warrant to said contractor in final payment of the amount due under said contract, and the contractor has been paid in full therefor; that on the 2d day of March, 1918, the said board of supervisors enacted an ordinance purporting to create a lien upon the lots of complainant of \$2.011315 per front foot toward the cost of said improvement; that thereafter in pursuance of the terms of said ordinance the respondent D. L. Conkling, treasurer of the City and County of Honolulu, served notice upon complainant that an assessment had been made against the premises of complainant in the sum of \$5738.19; that the assessment roll under and by which such assessment is sought to be levied is inaccurate, insufficient, uncertain and defective; that the assessment purported to be made against the property owners per front foot is \$2.011315, while the correct assessment against said property owners to collect said sum of \$9359.80 would be an assessment of \$1.9677 per front foot; that the so-called corrected map does not designate the several lots abutting upon said roads; that complainant has been notified by said respondent Conkling, treasurer as aforesaid, that unless he shall on or before the

Opinion of the Court.

6th day of April, 1918; pay the amount of the assessment against his premises, or 10% thereof, as provided by law, he, the said Conkling, treasurer, will declare all of said assessment delinquent and a lien upon said premises, thereby depriving complainant of his right and option to pay the same in ten annual instalments, and that the said Conkling, treasurer, will take such steps as are necessary and requisite to enforce said lien by the sale of said premises, and that unless restrained by the court said respondent Conkling will institute such steps as are necessary and will enforce said lien and sell the property of complainant for the satisfaction thereof and that the complainant is without adequate or other remedy at law and prays that a decree be entered setting aside said assessment and that said Conkling, treasurer, be restrained and enjoined from collecting or attempting to collect said assessment and that a temporary injunction issue to the same effect.

To which bill the respondents filed a demurrer setting forth various causes, a synopsis of which demurrer is as follows: that it affirmatively appears from the copy of the plans and specifications attached to said bill that all the matters of alleged defects set forth in said bill were matters of engineering expert judgment, the application or modification of which, if any, being wholly in the discretion of the city and county engineer, subject to the approval of the board of supervisors, as shown by various paragraphs (enumerating them) of said specifications; that it does not appear from said bill that there was any actual collusion or fraud on the part of the contractor, the engineer or the board of supervisors or any of them in the administration of said contract and specifications; that "no facts are alleged showing alleged maladministration of the contract so gross as to warrant this court taking jurisdiction of said cause and granting any

Opinion of the Court.

equitable relief therein;" that it "affirmatively appears from said complaint that the City and County of Honolulu relying upon the right to reimburse itself by assessments in good faith has advanced the moneys and paid the contractor for the improvements in question, with the full knowledge of complainant at the time as a result of which great hardship would be done the taxpayers of said City and County by entertaining the indirect attack herein upon the performance of the contract;" "that complainant admits special benefits to his property if the contract has been substantially performed, without alleging any facts showing such gross departure from the contract as to create fraud in any person connected therewith or to give this court jurisdiction to determine the question of substantial performance in this indirect attack;" "that substantial performance or any performance of the contract is not a prerequisite under the statute to a valid assessment upon complainant's property;" and various other grounds unnecessary here to specifically enumerate.

The question presented to this court is whether or not this bill alleges sufficient facts to establish the species of fraud necessary to warrant the intervention of a court of equity as prayed and the granting of an injunction as prayed by complainant, and not whether he has sustained an injury or suffered a wrong, the remedy for which would be cognizable in some other court. We shall therefore confine ourselves solely to this issue.

The complainant alleges divers departures on the part of the contractor from the terms and specifications of the contract and also his repeated protests against the manner in which the work was being performed and the terms of the contract violated. These various departures are alleged to have been of such magnitude that the completed contract was substantially different from that en-

Opinion of the Court.

tered into and by reason of this difference resulted in a fraud upon the complainant, who alleges that he at divers times informed the board of supervisors of the course that he was pursuing and of his continued and persistent breach of the contract and to them protested against the dereliction of the contractor and that by reason of their ignoring or disregarding his protests they were guilty of such negligence as to amount to constructive fraud upon their part of such a nature as to vitiate the whole improvement proceedings and to confer upon a court of equity jurisdiction to annul the same. In addition to this the bill alleges illegality in the action of the board of supervisors in accepting the contract and in advancing payment before the assessment ordinance was signed by the mayor.

The acceptance of the contract by the engineer and board of supervisors must in the absence of fraud be regarded as conclusive upon the complainant. In the case of *Laurence v. City of Portland*, 167 Pac. 589, the court says: "It is finally contended that the work was unskilfully done, that the provisions of the contract were disregarded by the contractor in seven respects, pointed out in the complaint, and that, as a result, the street is less desirable than if it had been constructed as required by the contract. It is alleged that the plaintiffs repeatedly protested as the work proceeded, and that notwithstanding these protests the street was accepted by the council. * * * The question is no longer an open one in this jurisdiction. * * * Findings of the council that the work has been done substantially in accordance with the contract * * * are conclusive, in the absence of fraud, unless made under an erroneous principle of law." In *Hendry v. City of Salem*, 64 Or. 152, the chief justice in delivering the opinion of the court says: "The principal contention is that the improvements made do not corre-

Opinion of the Court.

spond to the specifications in a number of particulars, and that the council fraudulently accepted the work knowing this fact. The proceedings for making this improvement seem to have been entirely regular and the council had jurisdiction to order the improvement and to enter into the contract. This being the case, mere irregularities in the method of carrying on the work will not be sufficient to release the property owners from the obligation of paying their assessments. *Wilson v. Salem*, 24 Or. 504 (34 Pac. 9); *Rubin v. Salem*, 58 Or. 91 (112 Pac. 713). The council accepted the improvement, and, in the absence of fraud, their decision that it complied with the contract is conclusive." See *Wingate v. Astoria*, 39 Or. 603.

No fraud on the part of the board of supervisors or of any city official is disclosed by the bill and while there may have been deviations from the specifications these deviations are not of such a gross nature as to warrant a court of equity in finding that a fraud had been perpetrated by these city officials upon the complainant and as determined by these officials, who are vested with this power and who will have to provide for the maintenance of these roads and will have to appropriate more than one-third of the cost of the improvement, there was a substantial compliance with the contract and specifications thereof, and from a careful consideration of the allegations of the complaint we are unable to discover wherein this judgment was at fault. The facts alleged are in our opinion insufficient to establish fraud of such a nature as would warrant a court of equity in granting the relief prayed upon this ground.

The complainant alleges as a further and additional ground for equitable relief that "the assessment is void because it is an assessment in excess of benefits" and "that the assessment as to him is unconstitutional and

Opinion of the Court.

void, being an attempt to deprive him of property without due process of law." Complainant contends in support of this allegation "that the street improvement in the contract has not been substantially performed and that the improvement is therefore much less costly and is inferior in quality and value to the improvement for which the assessment was levied." "Therefore the amount sought to be collected is in excess of benefits conferred and is illegal and void." The court having decided that there was a substantial compliance with the terms and specifications of the contract on the part of the contractor and that the finding of the board of supervisors to that effect would not be disturbed, the bill failing to show facts sufficient to establish the alleged fraud, we do not deem this contention meritorious or substantial. That "the assessment was unconstitutional and void, being an attempt to deprive him of property without due process of law." In *Davidson v. New Orleans*, 96 U. S. 97, cited and approved in *McCandless v. City and County*, 24 Haw. 524, it was held that "neither the corporate agency by which the work is done, the excessive price which the statute allows therefor, nor the relative importance of the work to the value of the land assessed, * * * nor that the assessment is unequal as regards the benefits conferred * * * are matters in which the state authorities are controlled by the Federal Constitution."

Nor can the allegation that payment was made upon completion and acceptance of the contract by the board of supervisors tend to show that such payment was fraudulent, illegal or prejudicial, nor can an irregularity of this nature, as alleged, be combined with an alleged fraudulent breach of the contract of performance for the purpose of magnifying complainant's alleged injury. We are of the opinion that the demurrer should have been sustained.

Syllabus.

The order appealed from is reversed and the demurrer is sustained.

W. W. Thayer and *P. L. Weaver* for complainant.

A. M. Cristy, First Deputy City and County Attorney (*A. M. Brown*, City and County Attorney, and *C. S. Davis*, Second Deputy City and County Attorney, with him on the brief), for respondents.

IN THE MATTER OF THE ESTATE OF CECIL
BROWN, DECEASED.

No. 1173.

ERROR TO CIRCUIT JUDGE, FIRST CIRCUIT.

HON. C. W. ASHFORD, JUDGE.

SUBMITTED JULY 9, 1919.

DECIDED JULY 30, 1919.

COKE, C. J., KEMP AND EDINGS, JJ.

WILLS—probate—nature of decree.

The probate of a will after notice as required by law is in the nature of a judgment *in rem*.

SAME—same—revocation of probate.

A decree admitting a will to probate can be set aside only upon sufficient cause shown, which involves both cause why the will should not be sustained and cause why the petitioner did not make a contest at the original hearing.

SAME—same—same.

An unfulfilled promise for the payment of money by the principal legatee under a will to one who refrained from contesting the probate of said will because of said promise does not amount to a fraud on the promisee and is not sufficient in itself to excuse the promisee for not having contested the probate at the original hearing.

Opinion of the Court.

OPINION OF THE COURT BY KEMP, J.

The plaintiff in error seeks a review of the decree dismissing his amended petition for the revocation of the probate of the will of Cecil Brown, deceased. Revocation was sought on the ground that at the time of the execution of the writing admitted to probate as the last will and testament of Cecil Brown, deceased, the said Cecil Brown was not of sound and disposing mind and memory sufficient to make a testamentary disposition of his property but by reason of protracted sickness was mentally incapacitated from making said purported will, and upon the further ground (which is alleged upon information and belief) that the making, signing and publishing of said paper purporting to be a will of said Cecil Brown, deceased, was procured through undue influence, imposition and fraud by and of Heinrich M. von Holt, one of the devisees and legatees named in said purported will, in this, that the said Heinrich M. von Holt was at the time of the making of said purported will, and for a long time prior thereto, the confidential agent of the said Cecil Brown and was in daily communication with said Cecil Brown during said time; that "the said Cecil Brown had on numerous occasions prior to the alleged making of said purported will, expressed his intention of leaving the bulk of his estate to petitioner and his brother Godfrey Brown, but was by said Heinrich M. von Holt importuned time and again not to leave any of his estate to petitioner and his brother Godfrey Brown, but to bequeath the same to him (Heinrich M. von Holt); that on account of the weakened condition of the mind of said Cecil Brown and the importunities of the said Heinrich M. von Holt, as aforesaid, the said Cecil Brown was prevented from carrying out his wishes and bequeathing his estate to your petitioner and his brother Godfrey Brown; that said purported will was prepared

Opinion of the Court.

by the said Heinrich M. von Holt some time prior to the death of the said Cecil Brown and retained in his custody until it was filed for probate herein, the contents thereof being carefully concealed from your petitioner during the lifetime of the said Cecil Brown; that the said Cecil Brown (evidently meaning Heinrich M. von Holt) not only importuned the said Cecil Brown to bequeath his estate to him, but poisoned and prejudiced the mind of the said Cecil Brown against petitioner and his brother Godfrey Brown." It is further alleged "That after the death of the said Cecil Brown and prior to the probating of said will by said Heinrich M. von Holt, as aforesaid, the said Heinrich M. von Holt promised petitioner that he would provide petitioner, as the brother of Cecil Brown, deceased, with sufficient money to take care of him and pay his living expenses during his lifetime, out of the estate of said Cecil Brown, deceased; that relying upon said promise of the said Heinrich M. von Holt, and believing that he would be amply taken care of during his lifetime by the said Heinrich M. von Holt, out of the estate of Cecil Brown, deceased, and not desiring to make publicly known the fact that his brother, said Cecil Brown, deceased, was *non compos mentis* at the time he is supposed to have executed said purported will and that the same was executed by him, if at all, through the undue influence, imposition and fraud of the said Heinrich M. von Holt, petitioner did not protest the probation of said will;" and "That the failure of the said Heinrich M. von Holt to keep his said promise with petitioner and furnish petitioner with sufficient funds to pay his necessary living expenses, and the belief of your petitioner that when said estate is distributed to the said Heinrich M. von Holt, that the said Heinrich M. von Holt will refuse to pay to petitioner any sums of money whatsoever, has forced your petitioner to seek the legal and

Opinion of the Court.

equitable right he is entitled to from this honorable court."

Heinrich M. von Holt and Frank F. Fernandez, devisees and legatees under the will, filed returns to the order to show cause issued upon the filing of the original petition. The probate judge found that the petition was insufficient on the grounds (1) that the allegations of undue influence, imposition and fraud and (2) that the allegations of excuse for not having made a contest at an earlier date were insufficient. The petitioner then filed an amended petition amending the allegations as to undue influence, imposition and fraud but declined to amend the allegations of excuse, whereupon the amended petition was dismissed and from the decree dismissing the amended petition the matter comes before us upon writ of error.

It seems to be practically conceded that the amended petition sufficiently alleges undue influence, imposition and fraud in the execution of the will, the probate of which is sought to be set aside, but it is urged that the allegations of excuse as to why the petitioner did not contest the probate of the will when it was offered are insufficient to entitle him to a hearing.

The controversy is thus narrowed down to the one question whether the petitioner has alleged facts sufficient, if true, to excuse him from not having contested the probate of the will when offered. It does not appear from the petition that he was not aware of the facts upon which he would now rely for revoking the decree. On the contrary it appears, at least by inference, that he then possessed all the information in that regard that he now has but he seeks to avoid the effect of that knowledge by alleging that he refrained from making the contest because of the promise of Heinrich M. von Holt, the principal beneficiary under said will, that he would sup-

Opinion of the Court.

port the petitioner during his life if he would not contest said will.

Can one who has refrained from contesting the probate of a will because of a promise made by another who will benefit by said will being sustained that certain payments will be made out of the estate devised by the will to the one thus refraining, in the absence of allegation of fraudulent intent on the part of the promisor in making said promise, be permitted to come in after the probate and have the decree set aside upon the ground that the promisor has not lived up to his agreement? There is respectable authority holding that he cannot. In *Myers' case*, 67 N. J. E. 560, which disclosed facts very similar to those alleged here, the court at page 564 said:

"The charge of fraud is thus presented. The caveator testifies that after she had filed her caveat and inaugurated the contest she was visited by the widow of the deceased, who then, and at other times, promised to pay her money if she would withdraw the contest, and that, relying upon such promise, she did withdraw from the contest. There is also evidence that others who did not caveat, but who were ready to aid in the contest against the probate, refrained therefrom because the same person promised them money for so doing. All these persons testify that after the probate the widow refused to perform her promises, and has continued to refuse ever since.

"This is the fraud upon which it is insisted the court had a right to act and set aside the probate and reinstate the caveat. In my judgment, it wholly fails to support such action of the court. It does not disclose any fraud committed upon the court, nor does it evince any fraud committed upon the persons. It merely discloses that they withdrew from the contest relating to their personal rights in interest in consideration of promises which were not performed."

We are of the opinion and hold that the probate of a will after notice as required by law is in the nature of

Opinion of the Court.

a judgment *in rem*, binding on all persons like other judgments, and can be set aside only upon sufficient cause shown, which involves both cause why the will should not be sustained and cause why the petitioner did not make a contest at the original hearing. *Keliipela-pela v. Pamano*, 1 Haw. 503-506. There is no period of limitation prescribed in our statute for barring such actions, but if there were such a statute it would not in our opinion have the effect of permitting one to bring such action whether or no at any time within the prescribed period without showing good cause why the contest was not made at the time the will was offered for probate, neither does the fact that there is no period of limitation for barring such action excuse the petitioner from bringing his case within the rules applicable to actions in equity for setting aside ordinary judgments. The power of a probate court to set aside a decree admitting a will to probate is equal to that of a court of equity on a bill filed for relief against a judgment or decree for fraud or mistake. *Bailey v. Stewart*, 14 Hun (N. Y.) 3-6.

“The sole grounds of relief in equity against a judgment of a court of law * * * are for accident, fraud, mistake or surprise, and where on account of one or more of these causes it would be against conscience to execute the judgment.” *Mills v. Briggs*, 4 Haw. 506, 507.

In the absence of allegations which would brand the alleged promise of von Holt as fraudulent (as for instance that he made the promise with the intention of not keeping it and for the purpose of misleading the petitioner into refraining from contesting the probate) we think the pleading falls short of stating facts which entitle him to such relief as he seeks.

The pleading is also further defective in that it is not alleged that von Holt has failed in whole or in part to

Syllabus.

keep his promise. It is stated inferentially that he has failed to keep his promise but not as a fact. Such fact can only be deduced from the allegation that the failure of von Holt to keep his promise has forced the petitioner to seek a revocation of the probate.

As we view the pleading in question the most that can be said of it is that it indicates that a state of facts exists which would entitle the petitioner to an action at law against Heinrich M. von Holt to compel the performance of his agreement if he fails to perform it.

The decree dismissing the petition is affirmed.

Andrews & Pittman for plaintiff in error.

Frear, Prosser, Anderson & Marx for defendant in error.

IN THE MATTER OF THE APPEAL OF E. J. LORD
FROM A RULING OF THE AUDITOR OF THE
TERRITORY OF HAWAII.

No. 1207.

TRIED JULY 23, 24, 25, 28, 29, 1919.

DECIDED AUGUST 5, 1919.

COKE, C. J., KEMP AND EDINGS, JJ.

MUNICIPAL CORPORATIONS—*contracts*.

Where there is a definite fund on hand and the receipt of additional funds is contemplated it is not illegal for the city and county authorities to let a contract obligating the City and County to the extent of the funds on hand and reserving the option to require additional work should the funds therefor be provided before the expiration of the period specified for the completion of the contract.

SAME—*same*—*awarding contract for public improvement*.

In the absence of any allegation or showing of fraud or collusion

Opinion of the Justices.

on the part of the awarding authorities their decision in determining who is the lowest bidder is conclusive, the presumption being that the authorities acted faithfully and honestly and for the public good after due and full investigation of the matter.

SAME—same—calling for tenders—modification of specifications.

Plans and specifications for work to be done by contract requiring competitive bidding therefor cannot be changed after the call for bids has been published without readvertising, but the unauthorized attempt of the city and county engineer to require supplemental bids without advertising, after publication of a call for tenders, cannot affect the plans and specifications as theretofore adopted and approved by the proper authorities and cannot affect the validity of the bids submitted nor of the contract entered into with the successful bidder.

SAME—same—time of completion of work.

Where it is provided in the specifications that "any shortening or lengthening of the road made necessary by lack or increase of funds shall decrease or increase the period allowed for construction proportionately as may be determined by the board" and the only necessity of curtailing the work that could arise would be from the lack of funds the reasonable construction of the language quoted is that the two years period specified for the completion of the entire work should be reduced in the same proportion that the money available bears to the amount of the bid.

SAME—same—method of handling excavations.

The fact that unit prices are called for on the method of handling excavations instead of the various character of the materials to be excavated does not vitiate the specifications nor the contract based thereon.

OPINION OF THE JUSTICES.

This is an appeal to the justices of the supreme court from a ruling or decision of the auditor of the Territory of Hawaii as provided for in section 1406 R. L. 1915. Pursuant to call for tenders duly published the board of supervisors of the City and County of Honolulu on March 4, 1919, received and opened bids for the construction of what is designated as the first unit of the belt road, Koolaupoko district, Island of Oahu. Two bids were submitted, one being that of the appellant E. J.

Opinion of the Justices.

Lord and the other of the Hawaiian Contracting Company, Limited. The board of supervisors took up the consideration of the bids and after sundry hearings the bid of the Hawaiian Contracting Company was rejected as irregular and not in conformity with the call for tenders, the form of proposal and the specifications relating thereto, and on April 1, 1919, the board awarded the contract to the appellant E. J. Lord, who hereinafter will be referred to as the contractor. Thereupon the contractor submitted an approved bond as required and the contract for the work was duly executed by the contractor and the City and County through its authorized officers. The contract was submitted to the auditor of the Territory for his certificate as provided for in section 1420 R. L. 1915, the purpose of which was to validate the contract by showing that funds were available sufficient to cover the amount required by the contract, and the auditor on June 24, 1919, attached to the contract his certificate to the effect that there was on hand and available the sum of \$281,699.58 unexpended and unapplied. The contract for the work having been duly and regularly executed by the proper city and county official and the contractor the board of supervisors instructed the city and county engineer to notify the contractor to commence work forthwith and the said engineer pursuant to said instruction did so notify the contractor on April 25, 1919; that after the receipt of said notification and on the 25th day of June, 1919, the contractor commenced work under said contract and on the 26th day of June, 1919, presented to the board of supervisors for approval his claim and demand in the amount of \$78.19; that said claim was duly certified to and approved by the city and county engineer and duly approved by the board of supervisors at its meeting on June 26, 1919, and thereafter the contractor duly presented his claim to the auditor of

Opinion of the Justices.

the Territory at the same time requesting a warrant therefor. The auditor disallowed and refused to approve said claim and refused to issue a warrant therefor and so notified the contractor by letter. From this decision of the auditor and his refusal to approve or allow the demand the contractor has appealed to the justices of this court.

In response to an order to show cause the auditor has appeared by his attorneys, and Mr. J. D. McNerny, a taxpayer of the City and County of Honolulu and a purchaser of territorial bonds sold for the purpose of raising funds to construct said belt road, was permitted to intervene. The territorial auditor interposed a motion to quash the order to show cause and the summons issued, and Mr. McNerny, by his attorney, interposed a motion to dismiss the appeal. The first motion was tacitly withdrawn and the merits of the second will be determined later on in this opinion. Thereupon the respective parties agreed upon the issues involved herein, which are as follows:

“It is contended by the auditor and denied by the appellant as follows:

“1. That the plans and specifications are so indefinite, uncertain and ambiguous as to defeat the purpose of calling for tenders.

“2. That the plans and specifications, together with the bids required to be filled up and filed, are so indefinite and uncertain as to render it impossible of ascertainment therefrom as to which of the competing bidders was the lowest bidder on the proposed work.

“3. That the fact that the sum of money now available for this belt road is not sufficient to complete the entire twelve miles (the first unit) of the road, renders it impossible to ascertain as to which of the competing bidders is the lowest bidder on that portion of the road capable of being built under existing available funds.

“4. That the said plans and specifications are such as

Opinion of the Justices.

to enable a bidder to submit an unbalanced bid and while appearing to be the lowest bidder, he might so perform the work under and according to the said plans and specifications as to be in fact the highest bidder.

"5. That the time as attempted to be fixed by the said plans and specifications within which the contract is to be performed is so indefinite and uncertain as to prevent real competition between the bidders.

"6. That the plans and specifications and the call for tenders were illegally changed at a late hour by a private communication from the city and county engineer to two only of the bidders, which change was not publicly or otherwise advertised; and further the additional call for tenders and the change in the plans and specifications relating to the hauling of cement and/or iron as made by the letter of the city and county engineer dated Feb. 27, 1919, is so indefinite, uncertain and ambiguous as to defeat the purpose of the call for tenders and is calculated in itself and in connection with the original plans and specifications to mislead prospective bidders.

"7. That the contract incorporated in the plans and specifications, and as executed by the parties, requires the contractor to continue and complete the contract, notwithstanding any decision by the courts declaring the said contract illegal.

"8. That the contract executed by the parties does not conform in matters of substance to the plans and specifications, and to the advertised call for tenders.

"9. That the contract executed by the parties does not conform in matters of substance to the contract referred to in, and made a part of the plans and specifications and the call for tenders.

"10. That E. J. Lord to whom the contract was awarded, was not the lowest bidder."

These issues were signed by all of the parties but Mr. McInerny filed additional and separate grounds for attack upon the legality of the contract between Lord and the City and County of Honolulu as follows:

"I. The specifications upon which bids for said con-

Opinion of the Justices.

tract were asked for are indefinite and uncertain in that (a) While time is made the essence of the contract by Section 33 of the general conditions of the specifications yet in the event of insufficient funds being available to complete the entire unit (which is the situation confronting us) the time of completion of such portion of the work as can be finished is left entirely to the discretion of the board of supervisors; (b) under said specifications, together with the form of bid prescribed, the contract might, contrary to law, be awarded to the highest instead of the lowest bidder for the work actually done; (c) that under the advertisement for bids and the specifications the respective bidders were required to make bona fide bids for the removal of material and performance of work well known by the county engineer at the time of the drawing of said specifications not to be required in the construction of the road required to be built under said contract; (d) that the necessary effect of including in said specifications work and labor known not to be required for the completion of said contract by said engineer as aforesaid was to give bidders upon said work an opportunity to make merely a nominal bid as to such work and labor.

"II. That said contract is shown by the appeal papers on file to be illegal and of no effect in so far as the obligation of the auditor to pay any sum of money thereon is concerned, the necessary certificate required to be placed thereon by said auditor before said contract can become operative not having been placed thereon.

"III. That under the appropriation act of 1918 and under the law permitting the issuance of bonds for the construction of the belt road the legislature appropriated the sum of \$500,000 for a completed road extending through the districts of Koolaupoko and Koolauloa, and authorized the issuance of bonds for that purpose. There exists no authority for letting a contract except for such completed road as contemplated by the appropriation act nor in excess of the sum of \$500,000 appropriated for such road."

No attempt will be made in this opinion to deal with

Opinion of the Justices.

the issues in the order in which they appear above and only those questions which we deem sufficiently important will be discussed.

The territorial legislature at the session of 1917 by Act 215, having in contemplation the completion of a part of the belt road, made an appropriation for "Belt road, Koolaupoko and Koolauloa 500,000.00 (Said road shall be built of a suitable concrete base and a high quality of wearing surface to insure permanency)." At the special session of the legislature of 1918 the foregoing item was amended by Act 11 to read as follows: "Belt road, Koolaupoko and Koolauloa, including completion of Pali road 500,000.00 (Said road shall be built of concrete on plans and specifications to conform as nearly as may be required for military necessity)." The City and County of Honolulu authorized the territorial superintendent of public works to contract for and to purchase at San Francisco, California, iron, steel, and cement for use in the construction of said belt road of the value of \$188,300.42 and by reason of the fact that the road was to be built so as to conform to the requirements of military use and the plans and specifications therefor to have the approval of the military authorities the federal war department agreed to transport, and did transport, all of said materials from San Francisco at the sole expense of the war department.

At the time the contract was submitted to the territorial auditor for certification there was a balance in said belt road fund of \$281,699.58. The certificate of the auditor endorsed upon the contract reads as follows: "I certify on the date of filing this contract or agreement in the audit office there remains unexpended and unapplied a balance in the appropriation for belt road Koolaupoko and Koolauloa the sum of \$281,699.58. M. G. K. Hopkins Auditor Ter. of Haw. Honolulu, T. H.,

Opinion of the Justices.

June 24, 1919." It is urged on behalf of Mr. McInerny that this certificate is not a sufficient compliance with that portion of section 1420 R. L. 1915 which reads as follows: "No such contract shall be binding or of any force until the auditor * * * shall endorse thereon his certificate that there is an available unexpended appropriation or balance of an appropriation * * * sufficient to cover the amount required." While the call for tenders and the plans and specifications cover a section of the road twelve miles in length and the two bids therefor were in the neighborhood of \$475,000, the city and county authorities realized that there were not sufficient funds to complete that entire mileage of road and expressly limited the liability of the City and County so that under no circumstances would the City and County be liable under the contract in any amount in excess of the money available. This was plainly expressed in the specifications as well as in the contract with Mr. Lord. It appears to have been in the minds of the city and county authorities that other funds might be acquired as the work progressed and in that event the right was reserved to the City and County through its board of supervisors to increase or decrease the work in accordance with the amount of money which might be available for the work. At the time the contract was let to Mr. Lord there was available for expenditure under the contract the sum of \$281,699.58, and to this extent alone was the City and County obligated to the contractor under the contract. In other words, the amount required under the contract was the amount which the auditor certified to be available as the unexpended and unapplied balance of the appropriation for the belt road, which was the sum of \$281,699.58. The certificate of the auditor need not be in the language of the statute. Indeed a substantial compliance with the intent of the

Opinion of the Justices.

statute is all that is required of him and in the present case we think the auditor's certificate did substantially comply with the statute as it clearly discloses that the amount of money for which the City and County is liable under the contract was available at the time the contract was let.

Counsel for Mr. McInerny point out that the liability of the bidder is for the total sum bid. With this statement we agree, but the liability of the City and County only extends to the amount of money on hand and this amount of money was certified by the auditor as available and unexpended and so far as the City and County was obligated was sufficient to cover the amount required under its contract with Mr. Lord.

If additional belt road funds were acquired after the date of the contract then the City and County might exercise its option to require the contractor to continue the construction work until those funds were exhausted. There is no vice in a provision of this nature. In fact public contracts of this character are not uncommon. See *Bradley v. U. S.*, 13 Ct. Cl. 166, affirmed in 98 U. S. 104.

Another issue herein, and which is also contained in the letter from the auditor to the contractor, is to the effect that Lord was not the lowest bidder. Little need be said upon this subject as our views are that in the absence of any allegation or showing of fraud or collusion on the part of the awarding authorities, which in this case was the board of supervisors of the City and County of Honolulu, the decision of the board is conclusive, the presumption being that the board acted faithfully and honestly and for the public good after due and full investigation of the matter. But stepping behind this presumption and investigating the merits of the question we find no difficulty in approving the decision of the

Opinion of the Justices.

board of supervisors in rejecting the bid of the Hawaiian Contracting Company for the reason that its figures were so indefinite, uncertain and contradictory as to justify the rejection of its bid because of irregularities contained therein. See 19 R. C. L. p. 1069 n 5; also *Maryland Paving Co. v. Mahool*, 110 Md. 397.

The validity of the contract with Mr. Lord is further attacked on the ground that the plans and specifications and the call for tenders were illegally changed at a late hour by a private communication from the city and county engineer to the prospective bidders, which change was not publicly or otherwise advertised. The letter of Mr. Cantin, the city and county engineer, of February 27, 1919, addressed to prospective bidders, wherein he attempted to call for supplemental bids for hauling cement and iron from Honolulu to the place of construction in case the U. S. quartermaster's corps or the City and County of Honolulu did not do the hauling, was entirely unauthorized and outside of the scope of the duties of the city and county engineer. This communication was sent out long after the call for tenders based upon the plans and specifications had been published and was an unauthorized act on the part of the engineer and should have been ignored by the bidders. Of course plans and specifications for work done by contract, requiring competitive bidding therefor, cannot be changed after a call for bids has been published without readvertising but in any event the board of supervisors alone was authorized to change the plans and specifications and require supplemental bids and this it did not do, hence the action of the engineer in attempting to call for supplemental bids for hauling concrete and iron in case the same were not hauled by the United States government or the City and County did not and could not affect the plans and specifications as theretofore adopted and approved by the

Opinion of the Justices.

proper authorities and could not affect the validity of the bids submitted nor of the contract entered into with the successful bidder.

Perhaps the issue upon which the appellee places the most reliance is that the specifications as to the time in which the work is to be completed are so indefinite and uncertain that a legal contract could not be based upon them.

The specifications provide *inter alia* that "The work shall be prosecuted in such manner as to complete, or to allow for the completion of the entire work contemplated in the pali to Hakipuu boundary section on or before two (2) years from the date of giving notice to commence as set forth in the preceding paragraph, including Sundays and holidays, and ordinary weather conditions, and any shortening or lengthening of the road to be constructed made necessary by lack or increase of funds shall decrease or increase the period allowed for construction proportionately as may be determined by the board." Provision is further made for extension of time should the work be delayed by causes not in the control of the contractor but such provision is not necessary to a discussion of the question before us. The portion of the specifications which gave rise to the issue under discussion is contained in the above quotation.

It is argued that as there are not sufficient funds to complete the whole work upon which bids were asked, and to do which two years are allowed, the length of time to which the contractor is entitled to complete the amount of work that can be done with the money available is indefinite and uncertain and cannot be definitely ascertained because he says no rule has been laid down by which the reduction in time is to be computed—that what the shorter time to be allowed shall be proportionate to is not stated and that the fixing of such shorter time is left to the arbitrary decision of the board.

Opinion of the Justices.

If the contention of the appellee that the time in which the work must be completed is not contained in the specifications and no definite rule by which the time is to be computed is contained therein is correct then his argument that no legal contract can be based thereon is sound, but if the time in which the work must be completed is fixed or a rule is laid down by which it shall be computed his argument must fail as not being based upon the facts of this case.

It must be conceded that under our statute (section 1418 R. L. 1915) requiring competitive bidding for the expenditure of public funds where the sum to be expended shall be one thousand dollars (\$1000) or more, and (section 1419 R. L. 1915) requiring that all such contracts be let to the lowest responsible bidder, in order to furnish a common standard for the competition either a reasonable time should be fixed in the specifications for the performance of the contract (or two or more alternative reasonable periods), or, if the bidders are left to name the proposed time of completion, the specifications should state the value of the difference in time between bids and thus furnish the means of reducing the bids to a common standard of measurement, or if one or more periods for performance are specified liberty may be given to the bidders to name a different period, the value of the difference in time being in such event also stated, or it should be specified that the award will be to the bidder (responsible) naming the lowest price irrespective of the time required by him for the performance of the contract. *Wilson v. Lord-Young Eng. Co.*, 21 Haw. 87-100.

In the case of *Gist v. Construction Co.*, 224 Mo. 369, 387-8, it was held that "the phrase 'shall fix the time within which such work shall be completed after,' etc., does not mean to fix the date at which the work shall

Opinion of the Justices.

commence nor the date when it shall end. The very bowels of the text, therefore, import flexibility. The contractor under that provision having ten months time might complete his work within one week and that week the last one or the first one. We are of the opinion that the maxim, That is certain which can be made certain, has application and that the statute means no more than the language meant in the *Cricket* case, *supra*, to wit, *prescribe or fix the rule by which the time is to be determined.*"

What then is to be said of that portion of the specifications in this case where it is provided that "any shortening or lengthening of the road to be constructed made necessary by lack or increase of funds shall decrease or increase the period allowed for construction proportionately as may be determined by the board"? The necessity for shortening the road to be constructed could only arise from the fact that sufficient funds were found to be not available to complete the contemplated work and in that event the time to be allowed the contractor must be reduced proportionately and we think the only reasonable construction of the language used and the context is that the two years allowed for completing the whole of the contemplated work shall be reduced in the same proportion that the money available bears to the amount of the bid. The remaining language "as may be determined by the board" means no more than that the board is the authority which in behalf of the City and County shall adjust the matter of the reduction of time. The board will be bound in its computation of the time to be allowed by the rule laid down in the specifications and would not be justified in arbitrarily fixing the time to be allowed the contractor.

The appellee insists that there has been no legal contract entered into between the City and County and the

Opinion of the Justices.

appellant because, as he contends, the specifications have not been approved by the superintendent of public works as is required by Act 215 S. L. 1917, as amended. Section 4 of said act provides that "No moneys shall be expended under items 18 to 25, both inclusive, * * * until the methods, materials, plans and specifications proposed to be used for the construction or reconstruction of any road or roads intended to be paid for in whole or in part with moneys provided by said items shall first be passed upon and approved by the superintendent of public works." Item 21 appropriates \$500,000 for the road in question and therefore comes within the section above quoted. Upon the title page of the plans the approval of the superintendent of public works is endorsed, so the approval of the plans is not questioned. The plans and specifications were submitted to the superintendent of public works together for his approval, having already been approved by the military authorities by an endorsement upon the title page of the plans only. In a letter written by the superintendent of public works to the city and county engineer a few days after he had endorsed his approval upon the plans certain changes in the wording of the specifications were suggested, as he has testified, to make them conform to recognized engineering terms. His endorsement was endorsed on the plans December 21, 1918, and this letter was written December 27, 1918. On January 24, 1919, the city and county engineer wrote to the superintendent of public works the following letter:

"It is my intention to recommend to the board of supervisors on the 28th inst. that the clerk of the City and County of Honolulu be authorized to call for tenders for the belt road permanent improvement according to the methods, materials, plans and specifications heretofore brought to your attention and approved by you as provided in Act 215 of the Session Laws of 1917. It is

Opinion of the Justices.

my intention to recommend that the call be for a period of thirty (30) days from the date of the first insertion of the advertisement therefor.

"I assume that all the matters covered by said Act 215 which are subject to your approval prior to such call have been fully complied with as appears in the files of your office and this office relating thereto. If you have anything further to present relating to this matter prior to such call will you kindly do so either to this office or before the board of supervisors at the date above mentioned."

To which the superintendent made the following reply on January 28, 1919, by letter:

"Replying to your inquiry of January 24th in reference to the new Belt Road, I beg to advise you that to the best of my knowledge, I have complied with all of the provisions required of me by Act 215."

Act 215 requires the plans and specifications to be approved by the superintendent of public works but does not specify in what manner such approval shall be expressed. The superintendent has testified that he did and does approve the plans and specifications and we think that his testimony to that effect, together with his endorsement on the plans and his letter of January 28, above quoted, constitute a substantial compliance with the provision of the law requiring his approval.

It is also contended that the specifications and proposals are ambiguous, indefinite and uncertain by reason of the fact that unit prices are called for on the method of handling excavations instead of on the various characters of materials to be excavated. In the proposals unit prices are called for on "Hand Excavation;" "Hauled Hand Excavation;" "Scraper Excavation;" "Hand Wasted Blasted Excavation;" "Hauled Blasted Excavation" and "Mechanical Shovel Excavation," etc., and it is contended that this method of calling for proposals renders the

Opinion of the Justices.

proposals made ambiguous, indefinite and uncertain. However, the specifications set forth the character of materials and conditions under which they are to be removed, which shall determine the method to be used in their removal, this to be determined by the engineer. This reduces the specifications and the proposals to the same degree of certainty that can be had in any proposal for unit prices on excavations. The quantity of any given material to be removed is bound to be to some extent uncertain until it has actually been excavated but this does not render a contract based upon such proposal invalid. *Chicago v. Duffy*, 179 Ill. 447; *Shippey et al. v. U. S.*, 49 Ct. Cl. 151.

It is not uncommon, as shown by the reported cases, for the specifications for excavation work, as they do in this case, to define what shall constitute a certain character of excavation, as "Rock Excavation;" "Hardpan Excavation" and "Earth Excavation" and making the decision of the engineer in charge final as to the character and quality of the work done, the nature of the material removed and the proper method of removing it. *Fitzgibbon v. U. S.*, 52 Ct. Cl. 164, 169; *Toomey Bros. v. U. S.*, 49 Ct. Cl. 172; *McBride Electric Co. v. U. S.*, 51 Ct. Cl. 448, 455.

All of the issues involved in this proceeding have been fully and carefully considered and are resolved in favor of the validity of the contract between the contractor, Mr. Lord, and the City and County of Honolulu.

The decision therefore of the territorial auditor is reversed and he is hereby ordered to issue a warrant upon the treasurer of the Territory of Hawaii in favor of the appellant, E. J. Lord, for the amount of his said claim heretofore filed with the auditor.

A. M. Cristy and A. G. Smith (*Peters & Smith* and A. M. Cristy on the brief) for appellant.

Syllabus.

J. W. Cathcart (*Thompson & Cathcart* and *Frear, Prosser, Anderson & Marx* on the brief) for the auditor.

M. F. Prosser and *U. E. Wild* (*Frear, Prosser, Anderson & Marx* and *Thompson & Cathcart* on the brief) for *J. D. McInerny*.

WONG WONG *v.* HONOLULU SKATING RINK,
LIMITED, A CORPORATION, MORRIS ROSEN-
BLEDT AND FRED HARRISON.

No. 1187.

MOTION TO DISMISS BILL OF EXCEPTIONS.

ARGUED AUGUST 4, 1919.

DECIDED AUGUST 8, 1919.

COKE, C. J. KEMP, J., AND CIRCUIT JUDGE FRANKLIN
IN PLACE OF EDINGS, J., DISQUALIFIED.

APPEAL AND ERROR—*bill of exceptions—extension of time.*

An order extending the time for presenting and serving a bill of exceptions twenty days from and after the filing of the transcript of evidence is not void for uncertainty.

SAME—*same—questions previously decided.*

When a bill of exceptions brings up only questions which have been decided on a former appeal the exceptions will be dismissed, but questions arising on necessary proceedings subsequent to the mandate and not covered by the former appeal are a proper subject of exceptions.

OPINION OF THE COURT BY KEMP, J.

This is a motion to dismiss the bill of exceptions on the grounds (1) that all matters in the case are *res judicata* and were decided by the supreme court in its decision in the present case in 24 Haw. 181, and (2) that

Opinion of the Court.

the defendants failed to perfect their appeal to this court in time and that this court never secured jurisdiction.

The second ground will be considered first. Judgment was entered September 4, 1918, and on the same day the defendants Rosenbledt and Harrison were granted "twenty (20) days from and after the filing of the transcript of evidence herein within which to serve and present their joint and (or) several bill of exceptions herein." It is the contention of the movants that such an order extending the time for serving and presenting a bill of exceptions necessarily contemplates that the transcript of the evidence shall be prepared by the official stenographer and filed by him in the regular order of business, otherwise the order is indefinite as to time and void. By affidavit it is shown that the case of *McCandless v. Castle* tried by the same court terminated at a later date than this case and that the transcript of the evidence in said case was filed on November 25, 1918. From this it is argued that the twenty days granted began to run at least on November 25, 1918, and as the bill of exceptions was not presented until April 23, 1919, it was not presented within the time allowed. There is no contention that the bill of exceptions was not filed within twenty days after the filing of the transcript.

In the case of *Harrison v. Magoon*, 16 Haw. 170, the circumstances as stated in the opinion were as follows: "On November 9, 1903, at the close of the trial in the circuit court, a nonsuit was ordered on defendants' motion. On November 12, 1903, judgment was entered. On November 14, 1903, a motion for a new trial was filed based on four grounds, namely, errors in admitting testimony, errors in excluding testimony, error in granting defendants' motion for a nonsuit, and error in discharging the jury. On December 31, 1903, time for filing a bill of exceptions was extended until ten days after the

Opinion of the Court.

disposition of the motion for a new trial. On January 15, 1904, the motion for a new trial was dismissed, and the time for filing a bill of exceptions was further extended until twenty days after completion of the transcript. The bill of exceptions was filed August 6, 1904, within the time allowed." A motion to dismiss the bill of exceptions was made and one of the grounds was that it was not filed within the time allowed by law. The court held that the exception to the dismissal of the motion for new trial was presented to the judge within the time allowed by law and refused to dismiss the bill.

In *Weinzheimer v. Kahaulelio*, 23 Haw. 374, judgment was entered March 8, 1916. On March 14 the defendant procured the following order to be entered by the circuit judge: "It is ordered that the defendants be granted 20 days after the preparation and filing with the clerk of this court, by the official stenographer of this court, of the transcript of evidence adduced at the hearing of said cause, within which to prepare and present to this court their bill of exceptions." The transcript was filed April 11 and the bill of exceptions was filed April 25. A motion to dismiss the bill of exceptions on the ground that the same was not filed within the time provided by law was overruled and the following significant language was used: "We think the order extending the time is sufficiently definite. It gave defendants twenty days after, that is, from the completion and filing with the clerk of the court of the transcript of the evidence by the official stenographer, in which to prepare and present their bill of exceptions. * * * The uncertainty, if any existed, as to the time the extension granted by the order would expire, was removed by the filing of the transcript with the clerk by the stenographer."

It would be difficult to find two cases more nearly parallel than this case and the *Weinzheimer* case. We

Opinion of the Court.

think the practice in this jurisdiction is too well established to justify a comparison of the practice with that of other jurisdictions with the idea of overruling it if found not to conform to that practice.

The other ground for dismissing the bill of exceptions is that all matters in the case are *res judicata* and were decided by this court in its former opinion.

"It is well settled that the second writ of error brings up nothing for revision except the proceedings subsequent to the mandate; and it follows that, if those proceedings are merely such as the mandate commanded and were necessary to the execution of the mandate, the writ will be dismissed, and any other rule would enable the losing party to delay the execution of the mandate indefinitely, which cannot be permitted." *Notley v. Brown*, 17 Haw. 455, 458.

Stewart v. Salmon, 94 U. S. 434, was a suit to foreclose a mortgage which was executed in the State of Georgia in 1863 when treasury notes of the confederate government constituted the principal currency of that State. The principal controversy was as to whether the mortgage note was payable in confederate currency or in the legal currency of the United States. The circuit court having held it to be payable in United States currency, the supreme court reversed the judgment of the circuit court and held the note to be payable in confederate currency which at the time was worth only one-third of its face value and ordered "the decree reversed and the cause remanded for further proceedings in accordance with this opinion." After the mandate was filed in the circuit court leave to file a plea *lis pendens* and an amended answer to the original bill setting up new defenses was asked by the defendants which was refused and judgment entered without further hearing for one-third the amount of the former judgment and a foreclosure of the mortgage from which the second appeal

Opinion of the Court.

was prosecuted. In dismissing this appeal the court said:

“An appeal will not be entertained by this court from a decree entered in the circuit court or other inferior court, in exact accordance with our mandate upon a previous appeal. Such a decree, when entered, is in effect our decree, and the appeal would be from ourselves to ourselves. If such an appeal is taken, however, we will upon application of the appellee, examine the decree entered, and if it conforms to the mandate dismiss the case with costs. If it does not, the case will be remanded with appropriate directions for the correction of the error. The same rule applies to writs of error.” *Stewart v. Salmon*, 97 U. S. 361.

The history of this litigation and the scope of the same are to be found in the opinions of this court in this case (24 Haw. 181) and the kindred case of *Leivers & Cooke v. Wong Wong*, 22 Haw. 766 and 24 Haw. 39.

Upon the original trial of this case a nonsuit was granted by the circuit judge in favor of defendants Rosenbledt and Harrison for the reason that the notice of lien was not in his opinion sufficient but was by reason of certain omissions void, and because demand for payment had not been made as required by law. Judgment was entered against the skating rink for the amount due and for a foreclosure of the mechanic's lien upon its interest in the property. From this judgment of nonsuit Wong Wong came to this court on writ of error, where it was held that the notice of lien was sufficient, that proper demand had been made after the filing of the lien and prior to filing suit to fix the lien against the interest of the owners Rosenbledt and Harrison. The judgment of nonsuit was reversed and the cause remanded to the circuit court for further proceedings consistent with the views expressed.

It is earnestly contended by the plaintiff at this time

Opinion of the Court.

that the only proceeding consistent with the views expressed would have been to amend the judgment theretofore entered against the skating rink and its interest in the property so as to effectuate a foreclosure of the lien against the interest of the defendants Harrison and Rosenbledt as well and that to do this required no hearing. He did not take this view of the matter when the case came on for disposition after the reversal but undertook to prove his whole case as though no trial had theretofore been had. An inspection of the answer of the defendants Rosenbledt and Harrison, upon which the case went to trial on the former occasion, discloses that notice was given that the defenses of illegality, fraud, release and payment would be relied upon. The case having been disposed of upon defendants' motion for nonsuit the matters of defense were not tried at the first hearing. After the plaintiff had concluded his case in the last hearing the defendants undertook to prove the defenses which they had plead.

Some of the exceptions now before us relate to alleged errors committed by the court in rulings upon these matters of defense. If these proceedings were necessary then the alleged errors which occurred subsequently to the mandate are subject to review.

We are not prepared to say that none of these proceedings was necessary and therefore hold that such of the exceptions as seek a review of proceedings subsequent to the mandate and not clearly passed upon in the former appeal are properly before this court. Only such exceptions as come within this holding will be considered upon the hearing.

The motion to dismiss the exceptions should be overruled and it is so ordered.

A Withington for the motion.

E. C. Peters contra.

Syllabus.

**S. M. DAMON, ET AL., v. RELIABLE TRANSFER
COMPANY, LIMITED, ET AL.**

No. 1163.

APPEALS FROM CIRCUIT JUDGE, FIRST CIRCUIT.

HON. C. W. ASHFORD, JUDGE.

SUBMITTED AUGUST 11, 1919.

DECIDED AUGUST 20, 1919.

**KEMP AND EDINGS, JJ., AND CIRCUIT JUDGE DEBOLT
IN PLACE OF COKE, C. J., ABSENT.****LIENS—*common law artisan's lien—effect of voluntary delivery to
owner.*****When one entitled to a lien upon a chattel for its repair volun-
tarily delivers such chattel to its owner the lien is extinguished.****SAME—*same—resumption of possession does not revest the lien.*****When the lien has been extinguished by delivery of the chattel
the lien does not revest upon possession being restored.****CHATTEL MORTGAGES—*liability of purchaser of mortgaged chattel with-
out consent of mortgagee.*****One who converts to his own use a chattel subject to a duly re-
corded chattel mortgage without the consent of the mortgagee is
liable to the mortgagee for its value.**

OPINION OF THE COURT BY KEMP, J.

On February 6, 1918, the complainants S. M. Damon, A. W. T. Bottomley and James L. Cockburn, copartners doing business under the firm name of Bishop & Company, and E. F. Bishop and A. W. T. Bottomley, guardians of the estate of said S. M. Damon, filed a bill in equity to foreclose a chattel mortgage given by the Reliable Transfer Company, Limited, a corporation, to secure the payment of its promissory note to said Bishop & Company dated April 28, 1916, for \$6000 payable in monthly instalments of \$500 each with interest at the rate of eight

Opinion of the Court.

per cent. per annum. The mortgage which was duly recorded on May 4, 1916, covered four auto trucks and other personal property therein particularly described and by its terms included "all personal property of every description, nature or kind whatsoever and wheresoever the same may be, now owned or possessed by the mortgagor, and all which the mortgagor may own or possess at any time hereafter during the existence of this security" etc. Failure to pay the principal sum of the note and interest thereon since the 16th day of February, 1917, was alleged. In addition to the mortgagor the bill joined as respondents the Club Stables, Limited, California Feed Company, Limited, Auto Service & Supply Company, Limited (corporations), and Pacific Automobile and Machine Shop, a copartnership. It was averred that the three corporations claimed some interest in the mortgage as attaching creditors; that the copartnership claimed some interest therein, the exact nature or amount whereof was unknown to complainants, and that all such claims were subject to the rights of complainants as mortgagees.

The bill prayed that the mortgage be foreclosed; that the amount due thereunder, including principal, interest costs and attorney's fees, be declared a first lien on the property and superior to any and all claims of the respondents; that a commissioner be appointed to sell the property and apply the proceeds of sale, after payment of expenses, to the mortgage debt; for a deficiency judgment; and for general relief. The Reliable Transfer Company filed no answer and made no contest. The Auto Service & Supply Company, Limited, and the Pacific Automobile and Machine Shop interposed motions to strike portions of the bill of complaint. The motions were denied and the respondents filed answers. The answers of Club Stables, Limited, and California Feed

Opinion of the Court.

Company, Limited, set up claims as attaching creditors which they prayed to be declared prior liens to the mortgage lien of the complainants. These claims were denied by the circuit judge. Neither of these respondents has appealed and no further reference need be made to them. The Auto Service & Supply Company, Limited, filed an answer in which it claims that the said after-acquired property was not subject to any claim or lien in favor of the complainants prior to its alleged claim; that Bishop & Company had guaranteed the payment of its bill for supplies furnished to the Reliable Transfer Company; that Bishop & Company made fraudulent representations concerning the solvency of the Transfer Company; that it had extended credit to the Transfer Company at the special instance and request of Bishop & Company; and that Bishop & Company by reason of such alleged fraudulent conduct was estopped to deny the priority of the lien claimed by it amounting to \$182.17. The Pacific Automobile and Machine Shop also filed an answer in which it claims that it had done repair work on the auto trucks and automobiles of the Reliable Transfer Company at the urgent request of Bishop & Company and upon the promises of the complainants that all reasonable charges and common law liens would be paid; that prior to February 16, 1917, services rendered and materials furnished amounted to the sum of \$181.55; that since February 16, 1917, services were rendered and materials furnished as artisans, repairmen and warehousemen to the Transfer Company at the special request of Bishop & Company and in reliance on their representations and promises that the claims therefor would be paid, amounting to \$403.45; that during all the time since April 16, 1916, the respondents have had continuous possession and a common law artisans', repairmen's and warehousemen's lien against the six ton Doane auto truck

Opinion of the Court.

for the sum of \$585 which is prior to any rights of the complainants who are estopped to deny the existence and priority of the alleged lien; that Bishop & Company had exclusive and absolute control of the finances, income and expenditures of the Transfer Company; and that as to the Minominee truck, mentioned in the mortgage and bill of complaint, the Transfer Company with the express consent and authority of Bishop & Company had sold it to the respondents for the sum of \$120, which sum had been credited on the bill against the Transfer Company. The answer prayed that the title to the Minominee truck be declared to have passed to the respondents; and that they be declared to have a prior lien against the six ton Doane auto truck for \$585. Replications to the answers were filed.

Trial was had which concluded May 18, 1918, and the circuit judge on that date rendered an oral decision which has been transcribed into the record, in which he found against the two contentions of the respondents to the effect that the note and mortgage had not been properly executed by authorized officers of the mortgagor corporation and that the indebtedness exceeded the capital of the mortgagor company contrary to law. These points are not urged here and must be considered as abandoned. The circuit judge also found that the mortgage was good and valid as to all the property therein specially mentioned and owned by the mortgagor at the time of its execution but ineffective as to all after-acquired property. As to the claim of Pacific Automobile and Machine Shop that it has a common law lien upon the six ton Doane truck to secure its repair and storage bill the circuit judge found that said lien was valid and superior to the mortgage lien to secure \$88.50 of the repair bill claimed and \$20 of the storage bill claimed but as to the remainder of said repair and storage bills claimed the mortgage

Opinion of the Court.

lien is superior. The \$88.50 bill which the circuit judge found to be a superior lien to the mortgage was the latest repair bill against the six ton Doane truck and the \$20 was the amount which he found to be a reasonable charge for two months' storage, the said respondent having retained possession of said six ton truck since the latest repairs amounting to \$88.50 were made. All other claims of this respondent were overruled.

As to the claim of the Auto Service & Supply Company, Limited, the circuit judge found that it had adjusted upon one of the mortgaged vehicles certain tires of the value of about \$157 but found that there was no guaranty or undertaking by the mortgagees, either through the agency of Mr. Macauley or otherwise, to pay for the tires; that Macauley did not give or purport to give such guaranty, either on behalf of the mortgagees or otherwise, and was not authorized or in any manner held out by the mortgagees as being authorized to in anywise represent them in the premises, and that the charges of fraud against the mortgagees were not established by the proof.

Having found against the claims of both respondents, except as to the portion of the claim of the Pacific Automobile and Machine Shop as above set out, a decree was entered foreclosing the mortgage as prayed for except as to after-acquired property and subject to the claim of Pacific Automobile and Machine Shop found to be superior to the mortgage and also that complainants recover of the respondent Pacific Automobile and Machine Shop \$120, the value of the Minominee auto truck mentioned in the mortgage and converted by said respondent to its own use.

The respondents Auto Service & Supply Company, Limited, and Pacific Automobile and Machine Shop have appealed and attack numerous rulings admitting and ex-

Opinion of the Court.

cluding testimony, allowing setoff against one of the respondents for the value of the Minominee truck, not allowing the full amount of storage and repair bills as a prior claim and not ordering a marshalling of securities.

The alleged errors in the admission and exclusion of evidence are so numerous that we shall not attempt a discussion of them. We have carefully read the record and the transcript of the evidence which is very lengthy and conclude that the respondents were allowed very wide scope in their attempt to prove the allegations of their answers. If the trial judge did not at all times maintain that degree of exterior calm expected of him in the face of the exceedingly long and tedious examination and cross-examination of witnesses attempted by counsel for the respondents it should not be charged up to him as indicating bias. They were given every opportunity to prove their allegations and failed.

The Pacific Automobile and Machine Shop complains that it should have been allowed the full five months' storage claimed. "The common law lien given to warehousemen does not extend to cases of private storage." 17 R. C. L. 603. A person not an innkeeper or warehouseman nor in the business of storing goods, who permits the property of another to remain on his premises under an agreement to pay storage, but without any agreement for a lien, has no lien for the storage at common law. *Lewis v. Gray*, 109 Me. 128. In the case at bar the one claiming the lien had no agreement with the owner of the truck for a lien nor that storage was to be paid and does not come within the class of persons entitled at common law to a lien for storage. The claim for storage in any amount was erroneously allowed but as the complainant has not appealed the decree for \$20 storage will not be disturbed.

It is further contended that the lien for repairs should

Opinion of the Court.

have extended to the whole repair bill instead of being limited to the last repair bill. The truck had at various times covering a period of about two years been repaired by the respondent at the request of the owner, but after each repair the truck was returned to the owner for use in his business until the final repairs, allowed as a prior claim, were made when respondent retained possession of the truck until it was taken from his possession upon process issued in this proceeding. In effect respondent admits that the character of lien claimed is extinguished by delivery of the chattel repaired but contends that the lien revested upon possession being restored. He relies upon *Drummond v. Griffin*, 114 Me. 120, 95 Atl. 506, as authority for his contention. That case involved a livery stable keeper's statutory lien for the board of a horse which was used daily by the owner and the holding was that the daily taking of the horse by the owner for the time being deprived the keeper of his lien but that upon the restoration of the horse to his custody for a continuation of food and shelter under his existing contract for so doing the lien would revest in him. The facts of the two cases are not at all similar. The horse was being boarded under a contract continuing in its nature and besides we are unable to tell what effect the statute creating the lien may have had upon that case. At any rate we do not feel justified in disregarding the long line of authorities holding that when a party entitled to a lien dependent upon possession voluntarily delivers the property to the owner the lien is extinguished. *Gregory v. Morris*, 96 U. S. 619; *Fishell v. Morris*, 57 Conn. 547, 18 Atl. 717; *Oakes v. Moore*, 24 Me. 214, 41 Am. Dec. 379; *Gardner v. LeFevre*, 180 Mich. 219, 146 N. W. 653; *Arians v. Brickley*, 65 Wis. 26, 26 N. W. 188.

As to the Minominee truck which the respondent purchased from the mortgagor we concur in the finding of

Opinion of the Court.

the circuit judge that the purchase was not made with the knowledge and consent of the mortgagees. The circuit judge made this finding upon ample evidence to support the finding. It is not contended that the truck was not subject to the mortgage. It is admitted that the respondent purchased it and appropriated it to his own use. We know of no avenue by which he can escape responsibility for the value of the chattel converted he having converted it without the consent of the mortgagees.

The only claim of the Auto Service & Supply Company, Limited, which is not disposed of by what we have already said, is that the complainants guaranteed the payment of the tire account of the mortgagor to it. The respondent's own evidence does not support this claim. Whether or not Mr. Macauley had or was held out as having authority to guarantee the account on behalf of complainants is immaterial because the evidence fails to show that he undertook to so guarantee it. We fail to find merit in any of the contentions of the respondents.

The decree should be affirmed and it is so ordered.

Robertson & Olson for complainants.

A. M. Cristy and *U. E. Wild* for respondents-appellants.

Syllabus.

RE TAXES A. MENEFOGLIO.

No. 1194.

APPEAL FROM TAX APPEAL COURT, FIFTH CIRCUIT.

SUBMITTED AUGUST 11, 1919.

DECIDED AUGUST 29, 1919.

KEMP AND EDINGS, JJ., AND CIRCUIT JUDGE FRANKLIN
IN PLACE OF COKE, C. J., ABSENT.

TAXATION—*assessment*.

The mere fact that other property in the same vicinity and of the same description has been assessed for a larger or smaller sum is no ground to set aside an assessment.

SAME—*same—valuation*.

While the purchase price of property is not the sole basis of taxation it may, in cases, afford a very clear indication of the taxation value of the property.

OPINION OF THE COURT BY EDINGS, J.

This is an appeal by the tax assessor from a decision of the tax appeal court of the fifth judicial circuit reversing the assessment on certain property situated on the Island of Kauai, consisting of $4\frac{1}{8}$ shares in the Moloaa hui which was returned by the taxpayer as being of the value of \$480. This valuation was raised by the tax assessor to \$1220 and the property assessed at that figure. From this assessment the taxpayer appealed to the tax appeal court of the fifth judicial circuit upon the ground as stated in the notice of appeal that there had been discrimination used in assessing his property. From the records in this court this appears to be the only ground of appeal. The evidence taken before the tax appeal court, if there was any evidence beyond the mere informal statement of the taxpayer

Opinion of the Court.

and members of the tax appeal court, shows that this property was purchased in the open market during the year 1918 for the sum of \$1220 and that while other shares in this hui were taxed for a less amount than the shares in question still other shares in the same hui were taxed for more.

We can see no reason for the judgment of the tax appeal court nor any ground based upon the record for reversing or modifying the assessment upon the property placed by the assessor. While as a general proposition it may be conceded that the purchase price of property is not in all cases the sole or even the proper basis of taxation the purchase price may, however, in other cases be a very clear indication of the taxation value of the property and of course in such cases may be used as the fundamental basis upon which the taxation value is predicated. In the case now before the court the assertion of the taxpayer himself goes to show that this valuation is a fair and just estimate of the market value and of the worth of the property generally. The mere fact that other property in the same vicinity and of the same description has been assessed for a larger or a smaller amount than the property of this taxpayer is no ground to base a claim for relief upon.

"The fact that other properties in Hilo have been assessed too low, if the assessment in question was made in good faith, which is not denied, does not afford a reason for reducing the assessment." *In re Taxes Catholic Mission*, 22 Haw. 764.

"A taxpayer cannot complain if he is properly assessed irrespective of whether some one else is properly assessed or not. See *Inter Island Steam Navigation Company v. Shaw*, 10 Haw. 640, where the court said: 'The main question in this case was whether the assessment of the plaintiff's property was correct, and, if it could be proved that the assessor did not follow the same course in all cases, this would not show that he

Syllabus.

did not follow the right course in this, or that he did not follow the right course in other cases, much less that he was guilty of fraudulent discrimination'." *O. R. & L. Co. v. Assessor*, 17 Haw. 163, 165.

The decision of the tax appeal court appealed from is reversed and the assessment fixed by the assessor is affirmed.

H. Irwin, Attorney General, for the assessor.

P. L. Rice for the taxpayer.

IN THE MATTER OF THE ESTATE OF JAMES
BICKNELL CASTLE, DECEASED.

No. 1179.

IN THE MATTER OF THE ASSESSMENT OF THE
INHERITANCE TAX ON THE ESTATE OF
JAMES BICKNELL CASTLE, DECEASED.

No. 1186.

APPEALS FROM CIRCUIT JUDGE, FIRST CIRCUIT.

HON. W. H. HEEN, JUDGE.

ARGUED AUGUST 26, 1919.

DECIDED SEPTEMBER 6, 1919.

KEMP AND EDINGS, JJ., AND CIRCUIT JUDGE DEBOLT IN
PLACE OF COKE, C. J., ABSENT.

TAXATION—*inheritance tax—dower.*

The estate which a widow takes in the property of her deceased husband as her dower does not pass to her by virtue of the intestate laws and is not subject to the inheritance tax which is chargeable only upon property which shall pass by will or by the intestate laws of this Territory.

Opinion of the Court.

SAME—same—charitable and educational trusts.

A devise to trustees in order to be exempt from an inheritance tax as being for or to be devoted to a charitable or educational purpose must be by the terms of the will given up wholly to such charitable or educational purpose.

SAME—same—annuity.

Where an estate is devised to trustees and such trustees are charged with the duty of paying out of such estate certain annuities, the annuities as such are not subject to the inheritance tax.

OPINION OF THE COURT BY KEMP, J.

James Bicknell Castle, late of Honolulu, died on April 8, 1918, leaving a will made in September 1907, which was admitted to probate on May 18, 1918, by which he disposed of his estate. On April 21, 1919, during the pendency of proceedings for the approval of the final accounts of the executors, the attorney general, on behalf of the Territory of Hawaii, intervened and moved for the appointment of appraisers of the estate for inheritance tax purposes, to the end that the inheritance tax due upon (a) the dower estate passing to the widow, (b) the estate transferred to the trustees, and (c) the life income passing to the son, Harold K. L. Castle, might be definitely ascertained. When the said motion was presented to the probate court having jurisdiction of the cause it was suggested by counsel that as a preliminary to the granting of the motion for the appointment of appraisers it should first be decided by the court whether any tax was due and payable from any person or persons upon any part of the estate transferred by said will or otherwise. Of course if it should be decided that no tax is due there would be no necessity for the appointment of appraisers and the motion presented by the attorney general would necessarily have to be denied. This procedure was agreed to by all parties and the question as to whether any tax is due from either the

Opinion of the Court.

widow, the son, or the trustees, was argued and presented to the probate court. The probate judge ruled (a) that no tax was due upon that portion of the estate which passed to the widow by way of dower, she having duly elected to take by way of dower rather than under the will, (b) that no tax was due upon the corpus of the estate which by the will was transferred to the trustees for the reason that the will created a valid, charitable trust and conveyed the remainder of the estate to the trustees for the purpose of carrying out the terms of the charitable trust, and (c) that a tax was due upon the life income which under the will was transferred to Harold K. L. Castle, the son. The probate judge allowed the Territory an interlocutory appeal from the first two rulings and allowed Harold K. L. Castle, the son, an interlocutory appeal from the last ruling as above set forth.

At the hearing on appeal the attorney general has confessed error in the ruling of the circuit judge to the effect that the annuity to Harold K. L. Castle is subject to a tax to be paid out of said annuity. In this we concur and in line with the holding of *Estate of Brown*, 24 Haw. 443, hold that as the residuary clause of the will transfers the entire estate (with the exception of the estate known as Mahuilani on Haleakala, Maui, which is devised to Julia White Castle,) to the executors and trustees, the inheritance tax (if any is due) must be paid by the executors and trustees out of the corpus of the estate. The residuary clause of the will is in part as follows:

“All the rest of my estate, real, personal and mixed, I devise and bequeath to my executors and trustees hereinafter named, for the following purposes:

“First. For the payment of my just debts and funeral expenses.

Opinion of the Court.

"Second. For the following uses and purposes which I will explain in some detail.

"I want the business represented by the Hawaiian Development Company, Limited, to go on in the same way as though I were here. The general plans of development in Kona and Koolau are very familiar to Mr. McStocker and in a broad, general way, to Mr. Withington and Mr. Thurston. I have gone into these various enterprises prepared, if necessary for their successful establishment, to hypothecate all of my securities; but, preferably to the continued burden of heavy indebtedness, as rapidly as full value may be obtained, by selling some of my old securities, to convert the same into the new enterprises.

"In line with this, it is my present intention, and in case of my decease I desire my executors and trustees, if in their discretion it seem best, to convert two thousand (2,000) shares of Alexander & Baldwin, Limited, stock into cash, provided it can be sold for not less than two hundred dollars (\$200.00) per share, putting the same into Kona investments, preferably West Hawaii Railroad Company, and into the Koolau Railway Company, either or both. After the Kona Development Company and the sugar enterprise which I have planned to mature from the Heeia Agricultural and Koolau Companies' properties shall have become successfully established, I do not wish to expand any further in sugar, but only so far as each mill may become the central factory for the manufacture of sugar from the cane bought of small growers.

"I do not bind my executors to follow the line of development above indicated, but mean to confer upon them the widest discretion as to investment and development. * * *

"My general aim in this whole matter is not to accumulate a great estate for my family or heirs beyond conserving the estate which I now possess and which may be conservatively valued as worth between a million and a million and a half, but to devote any increase thereof to the purposes hereinafter indicated.

"I desire my executors to appropriate fifteen hundred

Opinion of the Court.

dollars (\$1500) a month to my widow, that being about the amount necessary to maintain Kainalu, Mahuilani and Puuokoa, Tantalus, if she so desires: that is to say, I desire to have nothing less than this paid to my widow for that purpose, or, if she desires, to apply to her other uses, so long as embarrassing financial conditions do not prevent. Subject to the like qualification, that is, so long as such would not shorten the above named fifteen hundred dollars (\$1500.00) a month being paid to my widow, I desire to continue the payments which I now am making to an old friend and teacher in New York, Mrs. H. K. Hovey, whose present address is No. 7 West 108th Street, New York, two hundred dollars (\$200.00) quarterly; and I desire to pay to Dr. T. M. Coan, present address 70 Fifth Avenue, New York City, one hundred and fifty dollars (\$150) quarterly, for as long as each lives. I desire to assist Dr. N. B. Emerson in his literary work to such extent as may be necessary, not to exceed six hundred dollars (\$600.00) a year during his life.

“With the successful and profitable establishment, however, of the various enterprises involved, with the requisite income subsequent thereon, I desire to have the amount paid to my widow out of the estate from its income increased to a sum not to exceed forty thousand dollars (\$40,000.00) per annum.

“Upon the decease of my wife, Julia White Castle, I desire to continue an income to my son H. K. L. Castle, subject to the following conditions: The minimum not to be less than five thousand dollars (\$5,000.00) per annum unless caused by financial embarrassment or inconvenience (of which the trustees shall be the absolute judges); the maximum not to exceed forty thousand dollars (\$40,000.00) per annum, which forty thousand dollars (\$40,000.00) shall include the income which he may be receiving from any property which I may give him prior to my decease, including the income from the one thousand (1,000) shares of stock in Alexander & Baldwin, Limited, herein mentioned, together with that derived from property derived from his mother.

“Should the development of the estate be such as to

Opinion of the Court.

justify the expansion into other or related lines of business than those already initiated, of which condition my executors, or a majority thereof, are fully empowered, without qualification, to decide, and its expansion through establishment of other enterprises in harmony with the ultimate object of my remaining in active business, namely, to accumulate sufficient land and capital to systematically establish an effort to introduce a high-class agricultural immigration of northern races, preferably Scandinavian, Anglo-Saxon, and Teutonic, then I desire them to expand into such enterprises without hesitation and I hereby empower them amply herein for the purpose. * * *

"After the fulfillment of the requirements upon the estate as above set forth, I desire to have any excess of income, and after the decease of my said wife and son and said other beneficiaries before named, the whole income (always subject to the decision of the executors to devote same to any business enterprises whatsoever which they may approve) to accumulate toward an educational purpose to be initiated at such time as their judgment will determine the estate amply able to carry on without closing its commercial character."

What the testator terms his strong desire as to the nature of the work he hopes to have such school accomplish is set forth in a lengthy statement in which, after expressing the belief that individuals, communities and nations are depraved and weakened by the excessive accumulation of wealth and that luxury furnishes fertile soil for their decay, he expresses the further belief that the counteraction of this influence must be accomplished, if at all, through some method of education different from that employed by established schools. The problem which he desires such school to solve is, how may provision be made for the children of the well-to-do to receive that training in the habits of work and duty which necessity provides for the children of the poor? He suggests to his trustees that in order to accomplish this end

Opinion of the Court.

the school should be a co-educational agricultural and domestic science school located in the country; that it should be exclusively a boarding school and not a day school; that every student should be obliged to earn a certain definite proportion of his or her training and education; that the tuition charged should be nominal, the school to become a productive farm, and the endowment calculated to meet the deficit after full value has been credited for the products of such farm.

Under our statute all property which shall pass by will or by the intestate laws of this Territory from any person who may die seized or possessed of the same while a resident of this Territory is subject to the inheritance tax. Chapter 96 R. L. 1915. It is provided, however, in said chapter that "All property transferred * * * to any person, society, corporation, institutions, or associations of persons in trust for or to be devoted to any charitable, benevolent, educational, or public purpose, by reason whereof any such person or corporation shall become beneficially entitled, in possession or expectancy, to any such property, or to the income thereof, shall be exempt from this tax" (Sec. 1324).

It is claimed by the executors and trustees, and disputed by the attorney general, that the devise to them creates a trust for or to be devoted to an educational purpose and is therefore exempt, under the section above quoted, from the payment of the tax.

Julia White Castle, the widow of the testator, waived the provision made for her in the will and elected to take her dower, and the attorney general claims for the Territory the tax upon the dower which is disputed by the widow.

Our statutory dower is not the ordinary common law dower which was limited to a part of the real estate in which the husband had during the marriage an estate

Opinion of the Court.

of inheritance but is by the statute extended to include leasehold and freehold estates so held by the husband during the marriage and is also extended by the statute so as to give the wife "by way of dower" an absolute property in one-third part of all her husband's movable effects in possession or reducible to possession at the time of his death after the payment of all his just debts. Sec. 2977 R. L. 1915.

In order to determine whether the estate which the widow is given by the above statute is subject to an inheritance tax it must be determined whether it passes to her upon the death of her husband by virtue of "the intestate laws of this Territory," as there is no other expression in the inheritance tax law which could possibly make the tax apply to it. A determination of the nature of the estate which the wife has in her husband's estate by virtue of this statute will aid us in the solution of this question.

In *Carter v. Carter*, 10 Haw. 687, 694, Mr. Justice Frear, afterwards chief justice, in discussing the nature of the estate created by this section of our statute, speaking for the court said:

"That the estate in question was intended to be a dower estate is clear, because, (1) it is not limited to cases of intestacy; (2) it is expressly said to be 'by way of dower;' (3) it is coupled in the same section and sentence with dower in real estate, of which there can be no question; (4) it is part of an article entitled 'Of Dower;' (5) this article is part of a chapter entitled 'Of Husband and Wife,' which contains three articles entitled respectively 'Marriage,' 'Of Dower,' and 'Of Divorce and Separation,' thus showing that the estate was intended to be by virtue of the marriage relation, as a marital right, and not an estate of inheritance which naturally belongs and is put by the statute in an entirely different category; (6) the history of the law confirms this view, for when first passed in 1846, four years be-

Opinion of the Court.

fore the statute of descents was passed and thirteen years before the passage of the Civil Code of which it is now a part, it was made, with the subjects of marriage and divorce, a subdivision of the chapter defining the duties of governors who then had special charge and jurisdiction over such matters while questions of descent were left to the ordinary courts, and the substance of the section in question was then part of a section under the article relating to marriage and immediately followed the section (afterwards section 1286 of the Civil Code) which defined the marital rights of the husband, and was part of a section which also defined the other marital rights of the wife (afterwards section 1287 of the Civil Code), and it there expressly described the estate as going to the wife 'in virtue of her marriage' as well as 'by way of dower' and inseparably connected it with the dower estate in real property, by having the words 'The wife shall be entitled to' in place of the words 'Every woman shall be endowed of,' found in the first part of 1299, and merely the word 'and' in place of the words 'she shall also be entitled,' found at the beginning of the latter half of the section."

The effect of this is to hold that the nature of the estate which the wife has by way of dower under this statute is the same as the common law dower, so that anything that may be said of common law dower is equally applicable to this estate. A dower right is an interest in real estate not subject to the testator's disposition and is therefore not a transfer of or a succession to property of her husband. It is property which exists inchoately during her husband's lifetime under the laws applicable to intestacy. *McDaniel v. Byrkett*, 120 Ark. 295, 179 S. W. 491, 493.

The term "intestate laws" is found in most of the state statutes creating the special tax upon inheritance and has generally been held to include or refer to the statutes of descent and distribution and not to statutes defining the estate which the wife has or may take by way of

Opinion of the Court.

dower. In *re Page's Estate*, 79 N. Y. S. 382; *McDaniel v. Byrkett*, *supra*. In Ross on Inheritance Taxation, Sec. 56, it is said: "It is true that dower had its origin and continuance by force of the law and depends upon the husband's death for its consummation. But it is quite another thing to suppose that the estate is dependent upon the law of succession or owes its existence to any such transfer as the inheritance tax statutes contemplate. Dower comes to the wife by virtue of the marriage, and the death of the husband serves only to consummate not to transmit it. The law that confers dower on the widow is not the law that appoints the inheritance property of a decedent to designated heirs."

It is true that in North Carolina and Illinois the opposite view is taken and the term "intestate laws" held to include the statute defining the estate which the wife takes by way of dower. *Corporation Commission v. Dunn*, 174 N. C. 679; *Billings v. The People*, 189 Ill. 472. But we think that the better reason as well as the weight of authority favors the view that the term does not include the dower statute and that the wife's dower does not pass to her by virtue of the intestate laws. For further authorities in support of our view see *Crenshaw v. Moore*, 124 Tenn. 528, 34 L. R. A. (N. S.) 1161; *In re Bullen's Estate*, 47 Utah 96; *Succession of Marsal*, 18 La. 211, 42 So. 778; *In re Weiler's Estate*, 122 N. Y. S. 608; *In re Estate of Strahan*, 93 Neb. 828, 142 N. W. 678.

This brings us to the question of whether the devise to the executors and trustees or any part of it is subject to the tax.

The attorney general has argued that the devise violates the rule against perpetuities but we do not deem it necessary to decide this question as we think the question of whether the devise is taxable can be adequately disposed of without so doing.

Opinion of the Court.

If the property transferred to them is transferred in trust for or to be devoted to a charitable or educational purpose it is, by virtue of the provisions of section 1324 above quoted, exempt from the tax. If it does not come within this exemption it is subject to the tax.

The commonly accepted meaning of the word "devoted," and as defined by Webster is, "to give up wholly." If we accept this definition of the word used in the statute the property transferred to the executors and trustees by the terms of the will must be "given up wholly" to the educational purpose defined in the will to bring it within the statutory exemption. "In the interpretation of statutes words in common use are to be construed in their natural, plain and ordinary signification. It is a very well settled rule that so long as the language used is unambiguous a departure from its natural meaning is not justified by any consideration of its consequences, or of public policy; and it is the plain duty of the court to give it force and effect." 36 Cyc. 1114.

We think that it is clear from a reading of the will that the first purpose for which the devise is made to the executors and trustees, and to accomplish which the whole income may be used, is to provide an income not to exceed forty thousand dollars per annum for the testator's widow during her life and after her death to continue such income to his son H. K. L. Castle. It is true that the testator says that he wants certain railroad and development schemes in which he was interested to go on in the same way as though he were here but he says that his aim in this respect is not to accumulate a great estate for his family or heirs beyond conserving the estate which he then possessed but to devote any increase thereof to the purposes thereafter indicated. Immediately after this provision in the will he directs his

Opinion of the Court.

executors to pay to his widow and after her death to his son the annuity above referred to, and next directs that, under certain conditions in harmony with the ultimate object of his remaining in active business of which his executors are to be the judges, land and capital be accumulated to systematically establish an effort to introduce into this Territory a high class agricultural immigration of northern races, preferably Scandinavian, Anglo-Saxon and Teutonic.

Following the provisions above detailed are the provisions relative to initiating the educational purpose set out in the last paragraph quoted from the will in the first part of this opinion.

It is significant that the testator directs that the accumulation for the educational purpose is to begin "after the fulfillment of the requirements upon the estate as above set forth."

It has been argued that the annuity to H. K. L. Castle may never become payable as the will provides that it is to begin after the death of his mother and she may survive him; that his mother having waived the provision made for her in the will and elected to take her dower no part of the property transferred may ever be devoted to providing such annuity. But we think the election of the widow to take her dower operated to accelerate the provision in favor of the son and to make his annuity immediately a charge upon the estate. *Lidgate v. Danford*, 23 Haw. 317, 327; *Slocum v. Hagaman*, 176 Ill. 533; *Trustees Church Home v. Morris*, 99 Ky. 317; *In re Schulz's Estate*, 113 Mich. 592.

When a widow elects to take her dower instead of accepting the provisions of the will the general rule, as announced by authorities already cited, is that the legacies which were to have been effective at her death became immediately due, unless a contrary intention of

Opinion of the Court.

the testator is manifest. We can see nothing in the will before us which manifests such intention. The only reason we can conceive for the postponement of the annuity to the son until the death of the widow was that she might be provided for to the full extent contemplated and when that reason for postponement ceased, as it did upon her election to take her dower, we can see no reason why the next object of the testator's bounty should be delayed in its enjoyment. It is also to be noted that since the widow elected to take her dower and thereby diminished by one-third the corpus of the estate, it is not improbable that the estate will be unable to pay to the son the maximum income authorized by the will and it will be only just that he be compensated for this impairment of the estate by receiving his annuity for a longer period of time.

We conclude that the devise to the executors and trustees is not to be devoted to the educational purpose in the sense in which the statute contemplates it should be to entitle it to the exemption and is therefore subject to the tax.

The ruling subjecting the annuity of H. K. L. Castle to the tax, and from which he has appealed, is reversed. The ruling that the widow's dower is not subject to the tax and the ruling that the devise to the executors and trustees constitutes a charitable trust, from which rulings the Territory has appealed, are as to the first affirmed and as to the second reversed and the cause remanded for further proceedings consistent with this opinion.

H. Irwin, Attorney General, for the Territory.

A. Withington (*Castle & Withington* on the brief) for the executors.

F. M. Hatch for Julia White Castle and H. K. L. Castle.

Syllabus.

IN THE MATTER OF THE GUARDIANSHIP OF
MARY ANN WHARTON AND ALEXANDER K.
WHARTON, MINORS.

No. 1215.

RESERVED QUESTION FROM CIRCUIT JUDGE, FIRST CIRCUIT.
HON. J. T. DEBOLT, JUDGE.

ARGUED SEPTEMBER 2, 1919.

DECIDED SEPTEMBER 12, 1919.

KEMP AND EDINGS, JJ., AND CIRCUIT JUDGE FRANKLIN IN
PLACE OF COKE, C. J., ABSENT.

GUARDIAN AND WARD—*accounts—commissions.*

The investment by a guardian of money which represented capital at the inception of the trust does not constitute a final payment of such money and does not entitle the guardian to the commission which the statute provides shall be chargeable "upon the final payment thereof or any part thereof."

OPINION OF THE COURT BY KEMP, J.
(Edings, J., dissenting.)

It appeared in and by the first annual account of Henry Waterhouse Trust Company, Limited, guardian of the property of Mary Ann Wharton and Alexander K. Wharton, minors, that there had come into the hands of said guardian cash representing capital at the inception of the trust in the sum of \$5960.06, upon which the guardian had charged a commission at the rate of 2½ per cent. on the receipt thereof. It further appeared in and by said account that of said capital cash the guardian had invested in bonds of the Honolulu Gas Company, Limited, the sum of \$5445. It further appeared in and by said account that on making said investment the guardian charged a commission on said last mentioned sum at the rate of 2½ per cent. as and for a final pay-

Opinion of the Court.

ment of said sum, said commission amounting to \$136.12. The master to whom the account was referred filed a report calling the attention of the court to the matter and suggested that the court make a ruling thereon. It appears from the certificate of the circuit judge that in the past such commissions have been allowed by circuit judges in some cases under circumstances similar to those in the case at bar, but the practice has not been uniform and the court, being in doubt, has on motion of counsel for the guardian reserved for the consideration of the supreme court the question whether under the circumstances above shown the said charge of \$136.12 made by said guardian as and for a commission upon the final payment of said sum of \$5445 should be approved and allowed.

Thus we have for consideration the question whether upon the investment by the guardian of cash representing capital at the inception of the trust the guardian is entitled to charge a commission of 2½ per cent. upon the sum so invested as and for a final payment of such sum under the statute. So much of the statute as is applicable is as follows:

“Executors, administrators and guardians shall be allowed the following commissions upon all moneys received and accounted for by them, that is to say:

“Upon all moneys received representing the estate at the time of the institution of the trust, such as cash in hand and moneys realized from securities, investments, and from sales of real estate and personal property other than interest, rents, dividends and other profits coming due after the inception of the trust, two and one-half per centum.

“Upon the final payment thereof or any part thereof, two and one-half per centum; provided, however, that no commission shall be allowed as for final payments of such moneys except upon amounts actually expended and upon balances paid into court or to the parties there-

Opinion of the Court.

unto entitled, upon the final settlement of the services for which such executors, administrators or guardians shall have been appointed and qualified." (Sec. 2542 R. L. 1915).

The exact question has never been before this court upon facts identical with these although there was a near approach to these facts when the question was presented in *Re Estate of Banning*, 9 Haw. 453, and again in *Estate of James Campbell*, 16 Haw. 512. In the former case the commission was allowed and in the latter it was not allowed, but neither case decides the exact question here presented. In the *Banning* case the will directed the executor to invest the estate "in good securities with lower rates in preference to high rates with corresponding risks." The administrator with the will annexed invested the bulk of the estate in bonds and mortgages and claimed a commission for paying out the money so invested. This court held that where a trust directs the investment of the funds of the estate in a specific manner the showing that the funds of the estate have been invested closes the administration *pro tanto* and the administrator is entitled to commissions on the amount so invested. In the *James Campbell Estate* the executors invested money belonging to the estate in various bonds and mortgages and claimed commissions on the amounts so invested on the ground that these transactions constituted final payment by the executors to themselves as residuary distributees in trust. Answering this contention the court said: "With this contention we cannot agree. The trustees have not even yet qualified. Executors cannot declare that to be a final payment, upon which commissions are charged, which is in fact not a final payment. One of the purposes of the present proceeding is to get an order of distribution and make a final payment. This is not a case

Opinion of the Court.

where commissions are allowed to be charged on a simple paying out, but it must be a final payment." (p. 519.)

While, as we have said, the above cases are distinguishable from this case they are both valuable because of the reasons assigned for the conclusions reached. The commission was allowed in the *Banning* case on the theory that the funds having been invested as directed in the will the administration was as to those funds closed. In the *Campbell* case the commission was not allowed because money paid out for an investment is not a final payment and commissions are not allowed to be charged on a simple paying out, but it must be a final payment.

It is apparent that the investment of capital moneys by a guardian does not terminate his duties as to that portion of the estate. That portion of the estate may return to him in the form of money to again be invested or to be distributed to the parties entitled to it, so it does not come within the reasoning of the *Banning* case. Neither does it come within the reasoning of the *Campbell* case where the investments were made by executors without authority.

It is clear from the language of the statute, and it is admitted by counsel for the guardian, that a payment must be a "final payment" in order to entitle the guardian to charge the commission. The question to be determined therefore is, what constitutes a "final payment?" The statute says "that no commission shall be allowed as for final payments of such moneys except upon amounts actually expended and upon balances paid into court or to the parties thereunto entitled, upon the final settlement of the services for which such executors, administrators or guardians shall have been appointed and qualified." It is not contended that the investment of the funds in this case constituted "a balance paid into court or to the parties thereunto entitled," but it has

Opinion of the Court.

been argued that the moneys were "actually expended," the argument being that where the language "upon the payment thereof or any part thereof" is used the expression "any part thereof" necessarily refers to such a payment as we have in this case; that money paid out by way of investment is the only character of payments that would be made by a guardian other than by way of final settlement of the accounts of such guardian when the whole of such moneys would be finally paid out. With this contention we cannot agree. The guardian in most cases would be required during the term of the trust to actually expend and finally pay out sums less than the whole of such moneys which would be properly chargeable to capital or the corpus of the estate and it was such payments, we think, that the legislature had in mind when it used the language above referred to.

It has also been argued by counsel for the guardian that it would be poor policy to so construe the statute as to cause an unnecessary conflict between the trustee and the *cestui que trust*; that since the trustee is not entitled to commissions on property delivered in kind there would be a temptation to place the trust funds in savings banks or other places at low interest in order that upon the final termination of the trust the settlement may be made by the payment of cash and the right to the commission made secure. Our answer is that the legislature alone is to determine what is good policy and if it has not seen fit to authorize the payment of the commission we are without power to authorize it.

Our conclusion is that capital moneys paid out by way of investment under the circumstances of this case do not constitute an actual expenditure and are therefore not a final payment and that the guardian is not entitled to charge a commission thereon.

The reserved question is answered in the negative.

Opinion of Edings, J.

A. G. M. Robertson and U. E. Wild (Robertson & Olson and Frear, Prosser, Anderson & Marx on the brief) for the guardian.

F. Schnack, Guardian ad litem, in person.

C. F. Peterson amicus curiae.

DISSENTING OPINION OF EDINGS, J.

I am unable to concur in this decision. While the statute may be construed as decided it is also susceptible of a different, and to my mind a fairer, more liberal and satisfactory, construction. I am of the opinion that an investment of "moneys received representing the estate at the time of the institution of the trust" is a "final payment" as contemplated by the statute. In the event of such money so invested being repaid to the trustee and by him reinvested of course he would not be entitled to his second commission as money so invested would not be "moneys received representing the estate at the time of the institution of the trust."

In the case of *Estate of Banning*, 9 Haw. 453, the will directed the executor to invest the estate "in good securities with lower rates in preference to high rates with corresponding risk" and the issue before the court was whether or not the executor had complied with this requirement of the will, the beneficiary claiming that he had not. The court said: "Neither our law nor the directions in the will nor the exercise of a sound discretion forbade the making of the investments made by Mr. Allen. They were in the view of this court such that, had the necessity existed for their approval by the probate court, no good reason could have been advanced for withholding such approval at the time and under the circumstances under which they were made," and incidentally held that the executor or trustee was entitled to commissions upon such investment. The executor was

Syllabus.

not called upon or directed to make any special or specific investments but was simply directed by the will to perform certain acts in a certain manner—the identical acts in the identical manner which all trustees appointed by a court are directed and required to do.

IN THE MATTER OF THE ESTATE OF HER MAJESTY, LILIUOKALANI, DECEASED.

No. 1178.

ERROR TO CIRCUIT JUDGE, FIRST CIRCUIT.

HON. C. W. ASHFORD, JUDGE.

ARGUED SEPTEMBER 10, 1919.

DECIDED SEPTEMBER 22, 1919.

**KEMP AND EDINGS, JJ., AND CIRCUIT JUDGE DEBOLT
IN PLACE OF COKE, C. J., ABSENT.**

EVIDENCE—*pedigree—declarations.*

Before a declaration can be received in evidence the relationship of the declarant with the family must be established by proof independent of the declaration itself.

OPINION OF THE COURT BY EDINGS, J.

The writ of error in this matter is sued out by Theresa Owana Wilcox Belliveau seeking a reversal of the decision and order of the probate judge holding that in her attempted contest of the will of the late Queen Liliuokalani filed for probate by one of the executors therein named she failed to establish her alleged inheriting relationship to the late Queen and hence failed to show herself entitled to contest the will.

Opinion of the Court.

The case sought to be established by Mrs. Belliveau is in substance that at the time of the death of the late Queen Liliuokalani (which occurred November 11, 1917) she was related to the Queen in a nearer degree than any other living person, in that while she admits the genealogical connection of Prince Jonah Kuhio Kalanianaʻole with the late Queen, and that he was a great grandson of the late Queen's grandmother, Kamokuiki, she (Mrs. Belliveau) claims to be a great granddaughter of the late Queen's mother, Keohokalole. In order to establish her claim and to enable her to contest the will it was necessary for Mrs. Belliveau to prove (1) that she was the daughter of Kamaikaopa (w); (2) that Kamaikaopa was the daughter of Kauahaka (w); (3) that Kauahaka was the daughter of Keohokalole, who was the mother of the late Queen Liliuokalani.

It is conceded that Keohokalole was the late Queen's mother and also that Mrs. Belliveau's mother was Kamaikaopa. A summary of the testimony introduced by the plaintiff-plaintiff in error shows that she was the daughter of Kamaikaopa (w) and Gideon K. Laanui, and that her maternal grandparents were Kauahaka (w) and Kaukahele. To prove that Kauahaka (w) was the daughter of Keohokalole she (Mrs. Belliveau) relies upon the testimony of one Kioula, an aged Hawaiian, and the declarations made to her (Mrs. Belliveau) by one Wainee—alleged sister of her mother. This witness (Kioula) testified that the mother of Kauahaka was Keohokalole, who was the mother of the late Queen; that he was a poi vendor and saw the various parties mentioned, but had never spoken to any of the parties; that his information was derived from people "who are all dead," the name of the only one of whom he can recall was "Piiwi," a woman living at the time. The testimony of this witness (Kioula) was clearly inadmissible. None of the parties whose dec-

Syllabus.

laration he attempts to give was in any degree related to the family in question, either by blood or marriage. "Before a declaration can be received in evidence the relationship of the declarant with the family must be established by some proof independent of the declaration itself." *Makekau v. Kane*, 20 Haw. 203; *Fulkerson v. Holmes*, 117 U. S. 389.

In rejecting this testimony and the alleged declarations based upon it the trial judge arrived at the only conclusion which could legally be deduced from the entire testimony and his decision and order should be sustained.

The writ is dismissed.

E. J. Botts for plaintiff in error.

L. J. Warren (*Smith, Warren & Whitney* on the brief) for defendant in error.

IN THE MATTER OF THE ESTATE OF BENJAMIN
F. DILLINGHAM, DECEASED.

No. 1197.

RESERVED QUESTION FROM CIRCUIT JUDGE, FIRST CIRCUIT.
HON. W. H. HEEN, JUDGE.

ARGUED SEPTEMBER 16, 1919.

DECIDED SEPTEMBER 23, 1919.

KEMP AND EDINGS, JJ., AND CIRCUIT JUDGE FRANKLIN IN
PLACE OF COKE, C. J., ABSENT.

TAXATION—*inheritance tax—exemptions and deductions—federal estate tax.*

The amount necessarily expended by an executor in payment of the federal estate tax constitutes an expense of the estate as much

Opinion of the Court.

so as any expense of administration and can in no sense be said to have passed to the residuary legatee and is therefore to be deducted before computing the tax due upon such legacy.

OPINION OF THE COURT BY KEMP, J.

The petition of the executors of the last will and codicils of Benjamin F. Dillingham, deceased, for allowance of final accounts, distribution of estate and discharge of executors, having come on to be heard before the presiding judge of the first circuit court at chambers in probate and a question of difference having arisen between said executors and the treasurer of the Territory as to the amount payable by said executors to said treasurer as inheritance taxes under the laws of this Territory upon or in respect of the bequests under said will and codicils, the said question being whether or not, in assessing and fixing the values of such bequests for the purposes of said inheritance taxes, there is deductible from the gross value of the estate of said decedent the estate tax paid or payable by said executors under the laws of the United States, the said executors contending that said estate tax is so deductible and the said treasurer contending that said estate tax is not so deductible, the amount of said estate tax so paid being \$73,096.79, and the amount payable as such inheritance taxes being reduced or not according to whether the estate tax so paid is so deductible or not, and it being necessary to determine whether said estate tax is so deductible or not for the purpose of passing upon said petition for allowance of accounts, distribution and discharge, and in order to assess and fix the value of said bequests and the inheritance taxes to which the same are liable, under the laws of the Territory, the following question was reserved to the supreme court:

“Whether or not the estate tax paid or payable by said

Opinion of the Court.

executors upon or in respect to said estate under the laws of the United States is deductible from the gross value of said estate for the purpose of assessing and fixing the values of said bequests and the inheritance taxes to which the same are liable under the laws of Hawaii."

The record before us does not contain the provisions of the will and codicils involved but from statements of counsel for the executors made in argument and acquiesced in by the attorney general it appears that by the terms of said will and codicils all of the residuary estate of the testator, and which constitutes the bulk of his estate, is bequeathed to his four children in equal portions and that it is the tax to be paid upon these bequests that is here involved.

So much of our inheritance tax statute as is necessary to an understanding of what we have to say follows:

"Section 1323. Imposed when, rate. All property which shall pass by will or by the intestate laws of this Territory, from any person who may die seized or possessed of the same while a resident of this Territory * * * shall be and is subject to a tax hereinafter provided for * * * and all administrators, executors and trustees of every estate so transferred and the person to whom the property passes or is transferred or passed shall be liable for any and all such taxes until the same shall have been paid as hereinafter directed. The tax so imposed shall be upon the market value of such property at the rates hereinafter prescribed and only upon the excess over the exemption hereinafter granted. * * * The rate of the tax shall be at the following percentage rate of the market value of such property received by each person, * * * in excess of five thousand dollars. * * *" (Sec. 1323 R. L. 1915 as amended by Act 223 S. L. 1917.)

The federal estate tax is not included in the exemptions expressly specified in another section of the inheritance tax statute and there is nothing in the said statute which could possibly include as an exemption the amount

Opinion of the Court.

paid or to be paid by way of an estate tax under the laws of the United States and the \$5000 deduction above is the only deduction specifically allowed. So if the deduction contended for by the executors is proper to be allowed it must be by reason of such amount not having passed to the beneficiary by the will rather than by reason of having been exempted from the tax or having been allowed as a deduction by reason of the provisions of the statute. If that portion of the estate of the decedent which was required to pay the federal tax actually passed by the will to the residuary legatees and such tax was then payable out of such legacy the plain wording of our statute above quoted would require that it be taken into account in valuing the legacy for inheritance tax purposes inasmuch as such tax does not fall within the exemptions or deductions expressly specified in our statute.

We do not think, however, that it would be seriously contended that debts owing to the testator in his lifetime and therefore payable by the executor out of the estate before distribution and the expenses of administration incurred by the executor in the course of administration, although not mentioned in the statute, should not be deducted from the gross value of the residuary estate in determining what passed by the will for the purpose of arriving at a valuation upon which to compute the tax due from a residuary legatee, since under the statute the tax is to be computed on "the market value of such property received by each person." If then the federal estate tax is properly classed as an expense of administration or is a debt owing by the estate and payable by the executor out of the estate before distribution it seems reasonable that it should be treated in the same manner as a debt which the testator owed or an ordinary expense of administration, that is,

Opinion of the Court.

as not having passed to or having been received by the beneficiary.

This then brings us to a consideration of the nature of the federal estate tax because upon that, we think, depends the answer to the question whether or not the amount paid by way of such tax ever in fact passes to the beneficiaries under the will who are called upon to pay to the Territory a tax upon the property thus passing to them.

Section 201 of the federal estate tax law provides: "That a tax (hereinafter in this title referred to as the tax), equal to the following percentages of the value of the net estate, to be determined as provided in section two hundred and three, is hereby imposed upon the transfer of the net estate of every decedent dying after the passage of this act, whether a resident or nonresident of the United States: * * *" (U. S. Stat. L., Vol. 39, Pt. 1, p. 777.)

The sub-title of the act of which the above section is a part is "Estate Tax." This title is not only significantly descriptive of the character of the tax actually imposed but a persuasive indication that the duties with which Congress was dealing were so regarded by it. The value of the net estate, to be determined by deducting from the gross estate funeral and administration expenses, debts, certain losses incurred during the settlement of the estate, etc., and a flat exemption of \$50,000, is the basis for calculating the tax. (Sec. 203.) This includes the real estate devised or descending as well as the personal property passing to the executor. A return must be made by the executor showing the value of the gross estate, the deductions claimed, the value of the net estate and the tax payable thereon. (Sec. 205.) The tax is to be paid by the executor out of the estate before distribution (Sec. 207) and there is no apportionment of it among the various devisees or legatees.

Opinion of the Court.

From the foregoing provisions of the federal estate tax act it seems clear that the tax constitutes a charge upon the whole estate (less the specific deductions allowed) to be paid by the executor out of the estate and is a tax upon the power to transmit or the transmission from the dead to the living and is not a tax upon legacies to be measured by the value of such legacies.

We think that the amount necessarily expended in payment of the federal tax constitutes an expense of the estate as much so as any expense of administration and can in no sense be said to have passed to the residuary legatee and is therefore to be deducted before computing the inheritance tax due upon such legacy.

The precise question here involved has been decided by the courts of several states under inheritance tax statutes more or less similar to ours. Each of the courts reached its conclusion from a consideration of (1) upon what the tax imposed by the state statute is to be computed and (2) upon what the federal tax is a charge.

The Minnesota statute imposes a tax upon the transfer of property "by will or by the intestate laws" and provides that the tax shall be a specified per centum of the clear market value of the beneficial interest in the property which passes to the beneficiary designated by the will or the statute. The supreme court of Minnesota held the federal estate tax to be an expense of administration and decided that it must be deducted from the estate in ascertaining the clear market value of the beneficial interest in the property which passes. *State v. Probate Court of Hennepin County*, 166 N. W. 125.

The Illinois statute provides that the tax shall be imposed upon the beneficial interest which passes to the persons therein named and the tax is calculated on "the clear market value of such property received by each person." The supreme court of Illinois concluded that

Opinion of the Court.

if the federal estate tax paid by the executor is to be properly considered a debt or an expense of the administration of the estate the federal tax so paid should be deducted before computing the state tax. After reviewing the federal statute in question that court reached the conclusion that the deductions should be allowed but it is not clear whether it classed the tax as an expense of administration or as a debt of the estate. However, the case of *State v. Probate Court of Hennepin County, supra*, was quoted with approval, where, as we have pointed out, the deduction was allowed upon the theory that the tax was properly classed as an expense of administration. *People v. Pasfield*, 284 Ill. 450, 120 N. E. 286.

In Connecticut, the court having construed their act providing for a succession tax as being a tax upon the privilege or right of succession to the property of the decedent and not a tax upon property and that the amount of the tax was to be computed upon the value of the property inventoried "remaining after claims of creditors and charges of administration have been satisfied," held the federal estate tax to be an expense of administration and deductible although not included in the deductions expressly specified in the act. *Corbin v. Townsend*, 103 Atl. 647. See also *In re Roebling's Estate*, 104 Atl. (N. J.) 295.

In Pennsylvania a collateral inheritance tax is imposed upon all estates passing from any person who may die seized or possessed of such estate to any one other than the father, mother, wife, children, etc., and is computed upon the "clear value" of such estate. The supreme court of that state in passing upon the question of whether the federal tax is to be deducted from the estate before computing the inheritance tax held that such deduction should be allowed and quoted with approval the

Opinion of the Court.

following language from an opinion of Judge Solly of the orphan's court of Montgomery County: "Otherwise a legatee, devisee or heir or next of kin is paying the commonwealth a tax upon something which has not passed and never will pass to him. Such a result would be unjust and highly inequitable and shocking to one's sense of reason and justice." *In re Knight's Estate*, 104 Atl. 765.

The only decisions brought to our attention holding a contrary view to that reached by us and by the courts whose decisions we have reviewed come from the New York courts, the two most notable decisions being *In re Sherman's Estate*, 166 N. Y. S. 19, and *In re Bierstadt's Estate*, 166 N. Y. S. 168. In both of these cases the court rejected the claim of the executor that the amount of the federal estate tax should be treated as an expense of administration and deducted from the gross estate before the amount of the tax under the state law is fixed.

We think, however, that the view which we have expressed is supported by both reason and the weight of authority.

The reserved question is answered in the affirmative.

W. F. Frear and *U. E. Wild* (*Frear, Prosser, Anderson & Marx* on the brief) for the executors.

H. Irwin, Attorney General, for the Treasurer of the Territory.

Opinion of the Court.

JOHN KAHAKA KAHEPU v. CHARLES E. KING.

No. 1168.

MOTION TO QUASH WRIT OF ERROR.

ARGUED SEPTEMBER 22, 1919.

DECIDED SEPTEMBER 24, 1919.

KEMP AND EDINGS, JJ., AND CIRCUIT JUDGE FRANKLIN
IN PLACE OF COKE, C. J., ABSENT.

Per Curiam: This matter comes before us upon a motion of the defendant in error to quash the writ of error issued herein upon the ground that the bond filed is not in compliance with section 2527 R. L. 1915, which provides: "No writ of error shall issue until * * * a bond has been filed with the clerk in favor of the prevailing party in the proceeding in which the error is alleged to have occurred, or his personal representatives, conditioned for the payment of the judgment in said original cause in case of failure to sustain the writ of error."

So much of the bond filed herein as is necessary for an understanding of the question here involved is as follows:

"Now therefore, in consideration of the premises, we the undersigned, do hereby acknowledge ourselves jointly and severally bound unto the said Charles E. King, and to his heirs and assigns in the sum of three thousand one hundred (\$3100.00) dollars for the faithful performance of the following conditions, viz:

"That the said plaintiff shall pay all costs and damages caused the said defendant by virtue of the stay of the said alias execution and the proceedings thereto, if the said plaintiff shall not be successful in said writ of error in the supreme court of the Territory of Hawaii, in the above entitled cause.

"That the plaintiff shall if defeated in said proceedings in error, pay all costs of court accrued and to accrue in the above entitled cause, and that the said plain-

Opinion of the Court.

tiff will not, pending said writ of error on appeal, remove or dispose of his property liable to execution."

It will be seen that the condition of the bond required by the statute should be for the payment of the judgment in said original cause in case of failure to sustain the writ of error. The plaintiff in error admits that the bond filed does not contain that provision but has argued that inasmuch as the bond filed obligates him to pay all costs and damages caused the said defendant by virtue of the stay of execution that he has in effect obligated himself to pay the judgment in the original cause.

We think, however, that the damages which the plaintiff in error has obligated himself to pay are limited by what follows, namely, the costs and damages caused by the stay of execution, and can in no sense be construed as obligating him to pay the judgment in the original cause. In 2 R. C. L. at page 313 it is said: "A condition frequently encountered in appeal bonds is one providing for the payment of all damages resulting from the appeal. Such a provision includes only such damages as are the natural and proximate result and does not necessarily require the payment of the judgment recovered." If such a provision as that mentioned in the quotation above does not include payment of the judgment recovered we cannot see how the provision in the bond before us could be held to include payment of the judgment.

It does not follow, however, from the fact that the bond in question is insufficient that the writ of error should be dismissed. Section 2536 R. L. 1915 provides that "No * * * appeal or writ of error shall be dismissed for any informality or insufficiency of any bond, unless upon neglect of the party filing such bond to comply with an order of a court or judge having jurisdiction directing an amendment of such bond to be made or a new

Opinion of the Court.

bond to be filed within a specified time, not less than twenty-four hours." From this it would seem that it is obligatory upon us to first enter an order requiring the plaintiff in error to file a proper bond within a time to be fixed in said order and that a dismissal of the writ will be ordered only upon failure of the plaintiff in error to comply with such order. *Phillips v. Lun Chong Co.*, 14 Haw. 295.

The motion to quash the writ of error is therefore overruled and the plaintiff in error is ordered to file a properly conditioned and otherwise sufficient bond on or before the sixth day of October, 1919,

N. W. Aluli for the motion.

J. S. Ferry contra.

JOSEPH KEAHILIAU v. CHARLES E. KING.

No. 1174.

MOTION TO STRIKE BRIEF FROM THE FILES.

ARGUED SEPTEMBER 22, 1919.

DECIDED SEPTEMBER 24, 1919.

KEMP AND EDINGS, JJ., AND CIRCUIT JUDGE FRANKLIN
IN PLACE OF COKE, C. J., ABSENT.

Per Curiam: This matter comes before us on motion to strike from the files the brief of the defendant-plaintiff in error on the ground that the plaintiff in error failed to file his brief within fifteen days after the writ of error was placed on the calendar and that no extension of time either by stipulation of counsel or by order

Opinion of the Court.

of this court was ever granted the plaintiff in error.

The matter controlling the filing of briefs in this court is to be found in rule 3 of this court which provides in substance that within fifteen days after an appeal case has been placed upon the calendar the appellant shall file his opening brief, and that when, according to the foregoing provision of this rule, an appellant is in default the case may be dismissed. The writ of error in this case was placed upon the calendar on May 10, 1919, and no brief was filed or order secured extending the time for filing such brief until the 31st day of May, 1919, when the plaintiff in error procured from the chief justice an order extending the time in which to file said brief until the 15th day of June, 1919. On the 14th day of June, 1919, another order was procured from the chief justice extending the time within which said brief might be filed until the 20th day of June, 1919. Notwithstanding these extensions no brief was filed within the time thus extended and no further extension of time was secured. After the expiration of the time in the last mentioned order the plaintiff in error filed his opening brief whereupon this motion was made to strike said brief from the files and dismiss the cause.

No facts have been made to appear by affidavit or otherwise as to why the brief was not filed within the time allowed by the rule or within the time extended by the chief justice, and whether or not the rule which is applied to the extension of time for the filing of bills of exceptions to the effect that an extension of time cannot be granted after the time allowed by the statute or prior extension has expired should apply to the matter of filing briefs we think that the plaintiff in error in failing to file his brief within the time extended has shown decided laxness in the prosecution of his appeal and that the full penalty provided for in the rule is none too se-

Syllabus.

vere. We fully realize that the language of the rule does not make it mandatory that the proceeding be dismissed under circumstances such as we have before us in this case but the rule was undoubtedly made for the purpose of compelling diligent prosecution of appeals and writs of error in this court.

The motion is therefore granted and the brief ordered stricken from the files and the cause dismissed.

J. S. Ferry for the motion.

N. W. Aluli contra.

EMMA FORSYTH RUMSEY v. NEW YORK LIFE INSURANCE COMPANY AND BENSON, SMITH & COMPANY, LIMITED.

No. 1172.

APPEAL FROM CIRCUIT JUDGE, FIRST CIRCUIT.

HON. C. W. ASHFORD, JUDGE.

SUBMITTED SEPTEMBER 17, 1919.

DECIDED OCTOBER 1, 1919.

KEMP AND EDINGS, JJ., AND CIRCUIT JUDGE DEBOLT
IN PLACE OF COKE, C. J., ABSENT.

INSURANCE—*beneficiary—insurable interest.*

Where there are no ties of blood or marriage between the person whose life is insured and the person who procures the policy on such life there must be some pecuniary interest of the latter in the life of the former to sustain the insurance. But an indirect advantage is sufficient. It is enough that in the ordinary course of events pecuniary loss or disadvantage will naturally and probably result from the death of the one whose life is insured to the person obtaining the policy.

Opinion of the Court.

OPINION OF THE COURT BY EDINGS, J.

This is an appeal by the respondents New York Life Insurance Company and Benson, Smith & Company, Limited, from a decree entered in favor of the petitioner-appellee, Emma Forsyth Rumsey, finding that the said Emma Forsyth Rumsey "do have and recover of and from respondent New York Life Insurance Company the sum of five thousand dollars (\$5,000.00) with interest thereon at eight per cent. (8%) per annum from the 15th day of August, 1910, to date. * * * That respondent Benson, Smith & Company, Limited, acted as trustee for petitioner in receiving and retaining the sum of five thousand nine hundred fifty-nine and 55/100 dollars (\$5959.55), the proceeds of a judgment rendered and entered in the above entitled court on the 8th day of February, A. D. 1913, in an action entitled: 'Benson, Smith & Company, Limited, an Hawaiian corporation, plaintiff, vs. New York Life Insurance Company, a corporation, defendant,' in favor of Benson, Smith & Company, Limited, respondent herein, and against New York Life Insurance Company, respondent herein, which judgment was paid on the 3rd day of April, A. D. 1913, and that said Benson, Smith & Company, Limited, holds said sum of money as trustee for petitioner" and must account, and pay over to her said sum less the sum paid by said Benson, Smith & Company to the New York Life Insurance Company as premiums on said policy.

The case was tried upon an agreed statement of facts, the parties stipulating that the same should be considered the evidence in the suit, provided that the court should have the right to disregard the stipulation where it found the testimony and depositions were in conflict with the same.

The record before this court discloses, among other

Opinion of the Court.

things, the following facts: The petitioner instituted a suit in equity against the two respondents for the purpose of collecting the principal upon a policy of life insurance heretofore issued by the respondent New York Life Insurance Company upon the life of the petitioner's late husband, Samuel L. Rumsey, who died July 17, 1910, while said policy was in full force. Benson, Smith & Company, Limited, was incorporated in 1898. The business had theretofore been conducted as a private enterprise owned exclusively by George W. Smith, who upon its incorporation became, and has ever since remained, its president and manager. Samuel L. Rumsey had been an employee of the concern before its incorporation and upon its incorporation he subscribed to its capital stock, and later made further subscriptions, whereby at the time of the severance of his relations with Benson, Smith & Company, Limited, in 1904, he was the owner of one hundred shares of the capital stock of said corporation of the par value of one hundred dollars per share. The policy of insurance in question was issued June 11, 1903. At that time the stock of said corporation was held as follows: By George W. Smith, 363 shares; by Samuel L. Rumsey, 100 shares; by Alexis J. Gignoux, 30 shares; the remaining seven shares being held by several other parties, the initial capitalization having been \$50,000. In 1903, and prior to the application for said policy, it was agreed between said three principal stockholders, they being at the time also the president and manager, treasurer and secretary of said corporation, that they should mutually insure their lives in the sum of five thousand dollars each, at the expense of Benson, Smith & Company, Limited, and for its benefit—Benson, Smith & Company, Limited, being named as the beneficiary in such policy. All premiums upon the policy were paid by Benson, Smith & Company, Limited, except that, some years later, Rumsey also paid

Opinion of the Court.

a separate premium to the New York Life Insurance Company. The payment was made to the agent of the insurance company at Denver, Colorado, by the attorney of the Rumseys. The receipt for the money given by the agent recites that the payment was received from the attorney "for his accommodation and at his request" and that "neither I nor the office of said company with which I am connected have any record or knowledge of said policy, or authority to collect a premium upon it." The insurance company tendered the money back and then paid it into court and the New York Life Insurance Company "has not since that time had or received said sum of money or any part thereof in its possession." In January 1904 Rumsey left the Territory of Hawaii and was never again actively connected with Benson, Smith & Company, Limited, or its business, and never again returned to the Territory. In February 1905 Rumsey resigned the office of treasurer, the salary of which (\$250 per month) had apparently been paid to him up to that time. This retirement of Rumsey from the office of treasurer was caused because it had then "become apparent to him, the said Samuel L. Rumsey, and to said drug company, that he, said Samuel L. Rumsey, could not on account of the condition of his health ever return to the Territory of Hawaii, or ever again resume active connection with said drug company, or its business." Thereafter Rumsey did not draw any salary as an officer or as an employee of said corporation. While residing in the States Rumsey married the petitioner-appellee and later transferred to her all of his stock—one hundred shares—in said Benson, Smith & Company, Limited. This stock was later sold and transferred by petitioner-appellee to Benson, Smith & Company, Limited. The policy, while agreeing to pay (in the event of the death of Rumsey) the sum of five thousand dollars

Opinion of the Court.

to Benson, Smith & Company, Limited, "or its legal representatives, or to such beneficiary as may have been duly designated, at the home office of the company in the City of New York," also contained a provision whereby the assured might change the beneficiary at any time during the continuance of the policy, "by written notice to the company at the home office, provided the policy is not then assigned." The policy never was assigned. "No designation, or change of beneficiary, * * * shall take effect until endorsed on this policy by the company at the home office." The physical possession of the policy has always been held by Benson, Smith & Company, whereby it became impossible for Rumsey to technically comply with the provision of the policy regarding a change of beneficiary. Rumsey, however, sometime before his death, formally notified the New York Life Insurance Company that he had changed the beneficiary by substituting his wife, the petitioner-appellee, for Benson, Smith & Company. The New York Life Insurance Company replied to this notice that this change could not be made except by the manual and physical delivery of the policy itself at the home office for the purpose of having such endorsement made thereon. A long correspondence occurred between Rumsey and his wife and Benson, Smith & Company, Limited, which manifests a difference of opinion between them as to their respective rights under the policy, Benson, Smith & Company insisting upon the right to be considered the sole owner of all beneficial interest therein and the Rumseys insisting that even though such beneficial interest had formerly existed in Benson, Smith & Company, Limited, it had ceased upon the cessation of the relationship between Rumsey and Benson, Smith & Company, Limited.

The circuit judge held that Benson, Smith & Company, Limited, had no insurable interest in the life of Rumsey;

Opinion of the Court.

“that this entire series of transactions constituted what, in law, are known as wagering contracts,—and that the real purpose of the corporation in taking out the insurance in question, when stripped of verbiage and euphonious diction, was merely to speculate upon the lives of the three principal stockholders in the corporation.”

In our opinion this conclusion is not supported or warranted by the facts in the case, that is, the agreed statement of facts, the affidavits and depositions — the only facts before the trial judge and necessarily the only evidence upon which he could predicate a decision.

The purpose of the insurance was to protect the interests of Benson, Smith & Company, Limited, against a sudden demand for funds in the event of the death of any of the three men, they virtually owning the entire business; that also was Rumsey's understanding of the matter, and he regarded it as a perfectly legitimate business transaction and not that he was participating in a gambling scheme—nor was the contract in contravention of the rule of public policy against wager policies.

In *Grigsby v. Russell*, 222 U. S. 149, 154, the court says: “Of course the ground suggested for denying the validity of an assignment to a person having no interest in the life insured is the public policy that refuses to allow insurance to be taken out by such persons in the first place. A contract of insurance upon a life in which the insured has no interest is a pure wager that gives the insured a sinister counter interest in having the life come to an end. * * * But when the question arises upon an assignment it is assumed that the objection to the insurance as a wager is out of the case. * * * This being so, not only does the objection to wagers disappear, but also the principle of public policy referred to. * * * The danger that might arise from a gen-

Opinion of the Court.

eral license to all to insure whom they like does not exist. Obviously it is a very different thing from granting such a general license, to allow the holder of a valid insurance upon his own life to transfer it to one whom he, the party most concerned, is not afraid to trust. * * * So far as reasonable safety permits it is desirable to give to life policies the ordinary characteristics of property."

If a man can assign a policy of life insurance to one having absolutely no interest in his life, it would be absurd to assert that a man may not insure his own life in favor of one who has no insurable interest in it. This conception of the position of the parties is fully sustained by the authorities. Cooley's Briefs on Insurance 252 and cases cited. If the policy was taken out by Rumsey for the benefit of Benson, Smith & Company, Limited, it to pay the premiums under an agreement between the three stockholders in said corporation, Smith, Rumsey and Gignoux, that each of the other stockholders, Smith and Gignoux, at the time take out similar policies, which they did, Rumsey would not afterwards be any more at liberty to change the beneficiary under said policy than he would have been to change an assignee to whom he had assigned a policy on his life for a valuable consideration.

From this view of the case, which is entirely compatible with the records, the decision of the trial judge cannot be sustained.

That the insurance was taken out by Benson, Smith & Company upon the life of Rumsey in consequence of the agreement entered into by Smith, Rumsey and Gignoux can also be substantiated by the record. If such was the case, and we are of the opinion that this was the fact, the great weight of modern authorities hold

Opinion of the Court.

that it, Benson, Smith & Company, Limited, did have an insurable interest in the life of the insured (Rumsey).

"An insurable interest exists whenever the relation between the assured and insured whether by blood, marriage or commercial intercourse, is such that the assured has a reasonable expectation of deriving benefit from the continuation of the life of the insured, or of suffering detriment or incurring liability through its termination." Vance on Insurance, p. 129.

"It may be said generally, however, that while the earlier cases show a disposition to restrict it to a clear, substantial, vested pecuniary interest, and to deny its applicability to a mere expectancy without any vested right, the tendency of modern decisions is to relax the stringency of the earlier cases, and to admit to the protection of the contract whatever act, event, or property bears such a relation to the person seeking insurance that it can be said with a reasonable degree of probability to have a bearing upon his prospective pecuniary condition." May on Insurance, Sec. 76.

"Where there are no ties of blood or marriage between the person whose life is insured and the person who procures the policy on such life there must be some pecuniary interest of the latter in the life of the former to sustain the insurance. *But an indirect advantage is sufficient*, and a moral obligation will support the policy. It is enough that *in the ordinary course of events pecuniary loss or disadvantage will naturally and probably result* from the death of the one whose life is insured to the person obtaining the policy." 25 Cyc. 706.

"Indeed, it may be said generally that *any reasonable expectation of pecuniary benefit or advantage* from the continued life of another creates an insurable interest in such life. * * * The essential thing is, that the policy shall be obtained in *good faith*, and not for the purpose of speculating upon the hazard of a life in which the insured has no interest." Conn. M. L. Ins. Co. v. Schaefer, 94 U. S. 457, 460.

"Although, as was said by Mr. Justice Field, in War-

Opinion of the Court.

nock v. Davis, 104 U. S. 775, it is not easy to define with precision what will constitute such an interest, it may be stated generally to exist whenever the relations between the insured and the beneficiary are such as to justify a reasonable expectation that the continuance of the life of the former will result in advantage or benefit to the latter. It is not necessary, in order to create such an interest, that the insured shall be under any *legal* obligation, either financial or otherwise, to the beneficiary. It is not even necessary that kinship shall exist between the parties. If the insured is under a *moral* obligation to render care and assistance to the beneficiary in the time of the latter's need, then the latter has an insurable interest, other than a mere pecuniary one, in the life of the former." *Thomas v. Nat. Ben. Assn.* 84 N. J. L. 281, 282.

"One not the wife, child, parent, brother, sister or creditor of insured may have an insurable interest in his life." *Kentucky Life & Acc. Ins. Co. v. Hamilton*, 63 Fed. 93.

The appellant, the New York Life Insurance Company, having paid the judgment rendered against it in favor of the beneficiary in said policy, Benson, Smith & Company, Limited, is absolved from any and all further liability under said policy.

The decree appealed from is reversed and the cause remanded to the circuit judge for such further action compatible to this decision as may be necessary.

Andrews & Pittman for petitioner.

Thompson & Cathcart for the insurance company.

Robertson & Olson for Benson, Smith & Co., Ltd.

Syllabus.

C. D. LUFKIN, TRUSTEE, *v.* GRAND HOTEL
COMPANY, LIMITED.

No. 1127.

APPEAL FROM CIRCUIT JUDGE, SECOND CIRCUIT.

HON. L. L. BURR, JUDGE.

SUBMITTED SEPTEMBER 24, 1919.

DECIDED OCTOBER 4, 1919.

KEMP, J., AND CIRCUIT JUDGES DeBOLT AND BANKS IN
PLACE OF COKE, C. J., ABSENT, AND EDINGS, J.,
DISQUALIFIED.

BANKRUPTCY—*jurisdiction of courts of bankruptcy.*

District courts of the United States as courts of bankruptcy have jurisdiction to determine the validity of a mortgage executed by the bankrupt whether the alleged invalidity is due to provisions of the bankruptcy act, the common law or statutory enactment.

SAME—*same—effect of adjudication by bankruptcy court.*

Where the petitioning creditors in an involuntary bankruptcy proceeding elect to litigate in the bankruptcy court the validity of a mortgage given by the bankrupt neither they nor the trustee who represents them will again be heard upon the same issue in another court.

OPINION OF THE COURT BY KEMP, J.

This is an appeal from an order of the judge of the circuit court of the second judicial circuit denying leave to Ferdinand Schnack, trustee in bankruptcy of the estate of the Grand Hotel Company, Limited, a corporation, to intervene and defend in the suit of C. D. Lufkin, trustee for the First National Bank of Wailuku, and H. Streubeck, *v.* Grand Hotel Company, Limited, a corporation. On June 4, 1917, the said C. D. Lufkin, as such trustee, filed his bill before the circuit judge of the second judicial circuit at chambers in equity against

Opinion of the Court.

the Grand Hotel Company, Limited, a corporation, to foreclose a mortgage given to him in his representative capacity by the said respondent Grand Hotel Company, Limited, on the 28th day of November previous. On the 6th day of June, 1917, the respondent filed its answer in which it confessed the truth of the allegations in the bill and joined in the prayer of the petitioner for the appointment of a receiver whereupon the circuit judge entered a decree *pro confesso* foreclosing said mortgage and ordered the property sold at public auction on July 14, 1917, to satisfy the indebtedness found due from the mortgagor to the mortgagee and appointing a receiver to take charge of and conduct said Grand Hotel business until such foreclosure sale is in all respects complete and the regular order confirming the same shall have been made.

It does not appear from the record, but it does appear from statements in appellant's brief and concurred in by the appellee, that on July 13, 1917, a petition in involuntary bankruptcy was filed in the United States district court for the Territory of Hawaii praying that the respondent, the Grand Hotel Company, Limited, be adjudged a bankrupt, and upon the same day the said court upon application of the petitioning creditors ordered further action in the foreclosure proceedings stayed until hearing and decision upon an order to show cause directed to the petitioner C. D. Lufkin ordering him to be and appear before the said court as directed in said order to show cause why said stay should not be continued. The hearing on the order to show cause was continued from time to time and finally submitted upon the evidence taken at the hearing of the petition for involuntary bankruptcy. It does appear from the record that on July 19, 1918, the Grand Hotel Company, Limited, was adjudged a bankrupt and on said date a

Opinion of the Court.

decree was entered in the bankruptcy court in said cause wherein it was "adjudged and decreed that the indenture of mortgage dated November 28, 1916, made and executed by the Grand Hotel Company, Limited, to C. D. Lufkin, as trustee, for the First National Bank of Wailuku and H. Streubeck * * * is a valid and subsisting mortgage and lien, and that the proceedings begun and had in the circuit court of the second judicial circuit of the Territory of Hawaii, at chambers, in equity, wherein the said C. D. Lufkin, as such trustee, is plaintiff and the Grand Hotel Company, Limited, the said mortgagor, is defendant, for the foreclosure of said mortgage, does not constitute and is not a preference in law, and that the said circuit court of the second judicial circuit of the Territory of Hawaii has due jurisdiction of such proceedings, and the amended motion to vacate and set aside the order of date July 13, 1917, staying the proceedings in such cause be and the same is hereby granted, and the said order of date July 13, 1917, staying the proceedings in that certain action pending in the circuit court of the second judicial circuit, Territory of Hawaii, at chambers, in equity, in which C. D. Lufkin, as trustee for the First National Bank of Wailuku and H. Streubeck is plaintiff, and the Grand Hotel Company, Limited, a corporation, is defendant, is hereby set aside, vacated and dismissed."

A certified copy of the above decree was filed in this cause on July 23, 1918, and while the same was not originally made a part of the record on appeal we have ordered the certified copy so filed in this cause sent up to become a part of the record on appeal.

On the 8th day of August, 1918, Ferdinand Schnack filed his motion in the said foreclosure proceeding for leave to intervene therein, from which motion it appears that on the 19th day of July, 1918, the said Grand Hotel

Opinion of the Court.

Company, Limited, was adjudged a bankrupt and that at the first meeting of the creditors, which was held on the 3d day of August, 1918, he, the said Ferdinand Schnack, was appointed trustee of the estate of the said bankrupt and that he qualified as such on the 5th day of August, 1918. It further appears from said motion that on the 6th day of August the said trustee applied to the bankruptcy court for leave to apply to the circuit judge for permission to intervene and defend in the foreclosure suit aforesaid and that permission therefor was granted by said court. In said motion it was further alleged that on the 28th day of November, 1916, the First National Bank of Wailuku, Limited, and H. Streubeck each loaned and advanced to the Grand Hotel Company, Limited, the sum of \$10,000, aggregating the sum of \$20,000, and that the bankrupt as security therefor executed its notes and mortgage which were the subject of said foreclosure suit; that at said time, as the said bank and the said Streubeck well knew prior to loaning and advancing said sums to said bankrupt, the bankrupt owed the aggregate sum of \$25,720.29; that said additional indebtedness of \$20,000 so secured was incurred without the consent of the existing creditors of the bankrupt or any of them and contrary to the provisions of section 3302 R. L. 1915, the capital stock of the bankrupt being then the sum of \$25,000; that the moneys so borrowed were used by the bankrupt for purposes other than discharging either in whole or in part the debts it then owed and the indebtedness of said bankrupt was thereby increased to \$45,720.29.

The trustee also proffered with his motion a proposed answer containing in substance the same allegations, and praying "that the decree of foreclosure heretofore and on to-wit the 7th day of June, A. D. 1917, entered herein be vacated and set aside; that the petitioner take noth-

Opinion of the Court.

ing by his said suit; and that the bill of complaint herein be dismissed and that this repliant have costs herein incurred."

Upon a hearing of the motion by the circuit judge the same was denied for the reasons, as stated in his decree, (1) that the movant had no proper standing to file the proposed answer; (2) that inasmuch as the judgment had been rendered upon June 7, 1917, the said motion was not proper in that it came too late, and (3) that the proposed answer did not set up facts sufficient to constitute a defense to the complaint on file in said suit.

The appellee has argued as reasons why the order of the circuit judge refusing leave to the appellant to intervene in said foreclosure proceeding should not be sustained, (1) that the decree or order denying leave to intervene was within the discretion of the circuit judge and therefore not appealable; (2) that the appellant should have first moved to set aside the judgment as a condition precedent to filing his motion for leave to intervene, and (3) that the motion to intervene came too late and could not be allowed after the decree. The appellant has contested all of these questions, and assuming, without so deciding, that the appellant's contention upon all of these questions is correct still if his motion and answer which were proffered for filing did not set forth facts which if true would entitle him to the relief or any of the relief for which he prayed the order of the circuit judge denying him the right to intervene would not be set aside.

It is contended by the appellee that the motion and answer did not state facts which would entitle the appellant to the relief or any of the relief for which he prayed for the reason that the question which he sought to have litigated had already been litigated and adjudicated against his contention by the United States district court

Opinion of the Court.

for the Territory of Hawaii sitting as a court of bankruptcy. The appellant's response to this contention is that the United States district court was without jurisdiction to decide said question and that any attempt to do so was beyond its powers.

There can be no question but that the decree of the bankruptcy court, a certified copy of which was filed in the circuit court prior to the filing of the motion for leave to intervene, did adjudge and decree that the mortgage in question was a valid and subsisting lien and if it had the jurisdiction to determine that question the parties to such proceeding would undoubtedly be precluded from asserting the same matters in another court. The act of Congress of July 1, 1898, entitled, "An Act to establish a uniform system of bankruptcy throughout the United States" (30 Stat. L. 544), creates the United States district courts courts of bankruptcy and undertakes to confer upon them such jurisdiction at law and in equity as will enable them to exercise original jurisdiction in bankruptcy proceedings, and among the many general and specific powers which section 2 of said act confers upon said courts, it authorizes them to make such orders, issue such process and enter such judgments in addition to those specifically provided for as may be necessary for the enforcement of the provisions of this act and the section which contains the specific and general provisions governing the jurisdiction of bankruptcy courts at its conclusion provides "that nothing in this section contained shall be construed to deprive a court of bankruptcy of any power it would possess were certain specific powers not herein enumerated."

The main purpose of the bankruptcy act is to administer the estate of the bankrupt and to see to it that his estate is applied *pro rata* to the payment of his debts

Opinion of the Court.

where a preference has not been legally secured by some of the creditors.

From these provisions it seems clear to us that Congress intended to confer upon the bankruptcy courts full power and jurisdiction to guard the interest of the bankrupt's creditors, and certainly if the mortgage in question was void as to such creditors, as contended by the appellant, the bankruptcy court in the exercise of this power had full power and jurisdiction to adjudge whether it was void by reason of the provisions of the bankruptcy act, the common law or statutory enactment.

The question here involved must not be confused with the right of a trustee in bankruptcy to bring an independent suit in the district courts of the United States in cases where no facts, such as diversity of citizenship, exist to confer upon such court jurisdiction of the parties. Neither are we to be understood as holding that the circuit court had not jurisdiction to try the question involved had resort been first had to that court by the parties. It was the right of the creditors to refrain from raising the question of the validity of the mortgage in the bankruptcy court and after the adjudication to have their trustee apply to the circuit court just as he did for leave to intervene and make the defense. But having elected to litigate this question in the bankruptcy court, which we think had full authority and jurisdiction to determine the question, neither they nor the trustee who represents them will again be heard to urge this question. *In re Sievers*, 91 Fed. 366.

There are cases where the jurisdiction of the United States district court was invoked by bill in equity to enjoin the exercise by a state court of jurisdiction over such controversies as this between trustees in bank-

Opinion of the Court.

ruptcy and third parties wherein it was held that the court had not jurisdiction (*Heath v. Shaffer*, 93 Fed. 647), but as we have said we do not regard such cases as authority on the question of the right of such court sitting as a court of bankruptcy to determine the question of the validity of any transaction involving the bankrupt.

Having reached the conclusion that the bankruptcy court had full power and jurisdiction to adjudicate the question of the validity of the mortgage and that it has adjudicated said question it would seem to be unnecessary for us to further discuss the question of whether or not the proffered answer of the movant set forth facts which would entitle him to the relief sought or any relief. This would undoubtedly be so unless the movant was entitled notwithstanding the validity of the mortgage in question to the relief or some of the relief which he sought to obtain through said intervention.

It is undoubtedly true that if the mortgaged property should at a foreclosure sale bring an amount in excess of that necessary to discharge the debt of the mortgagor to the mortgagee and pay the expenses of litigation the trustee in bankruptcy would be entitled to such excess as a part of the estate of the bankrupt. It is also true that at the time of the hearing on the motion for leave to intervene the property in question had not been sold and it had not been and could not at such time have been ascertained whether or not there would be such surplus. It appears, however, from a decree entered by the circuit judge on the 19th day of August, 1918, overruling certain objections to confirmation of sale, confirming the sale of property, approving and allowing costs of court and commissioner's and attorney's fees and awarding a deficiency judgment that the property sold for less than sufficient to satisfy said mortgage and the costs and ex-

Opinion of the Court.

penses of litigation and that a deficiency judgment for \$4415.12 was entered against the Grand Hotel Company, Limited, in favor of said C. D. Lufkin, trustee.

The objections which the trustee in bankruptcy urged to the confirmation of said foreclosure sale have not been brought up on appeal nor does the notice of appeal in this case include the decree confirming said sale, the appeal being solely from the decree entered on the same day, namely, the 19th day of August, 1918, denying the motion for leave to intervene and defend.

If we are at liberty to consider the facts disclosed by the decree confirming the sale, and since said decree has been made a part of the record on this appeal we see no reason why we should not consider them, it would appear that no relief could have been granted to the movant had he been permitted to intervene for the reason that the mortgaged property was not of sufficient value to satisfy the mortgage debt and costs and the motion was therefore properly denied.

E. Vincent, D. H. Case and Thompson & Cathcart for petitioner.

Peters & Smith for the trustee in bankruptcy, movant.

Syllabus.

HONOLULU LODGE NO. 1 MODERN ORDER OF
PHOENIX v. TRENT TRUST COMPANY, LIM-
ITED.

No. 1140.

EXCEPTIONS FROM CIRCUIT COURT, FIRST CIRCUIT.
HON. S. B. KEMP, JUDGE.

SUBMITTED OCTOBER 3, 1919.

DECIDED OCTOBER 8, 1919.

EDINGS, J., AND CIRCUIT JUDGES FRANKLIN AND DEBOLT
IN PLACE OF COKE, C. J., ABSENT, AND KEMP, J.,
DISQUALIFIED.

CORPORATIONS—*bonds*.

A corporate bond payable to bearer and secured by a mort-
gage trust deed is a negotiable instrument.

NEGOTIABLE INSTRUMENTS.

A corporate bond payable to bearer and secured by a mortgage
trust deed is a negotiable instrument.

SAME—*theft—rights of true owner*.

A *bona fide* holder for value of a lost or stolen negotiable
bond taken in the usual course of business acquires a good title
thereto even as against him from whom it was stolen.

OPINION OF THE COURT BY EDINGS, J.

This is an action in trover to recover the value of three
first mortgage six per cent. twenty-year bonds, numbers
989, 990 and 991 of the Olaa Sugar Company, Limited,
an Hawaiian corporation, alleged to have been wrong-
fully converted by the defendant.

Upon the trial (jury waived) the court granted a non-
suit upon the ground that the defendant was a holder
in due course of negotiable instruments and had a right
to the possession, and therefore not liable.

The case comes here on exception to the judgment of

Opinion of the Court.

nonsuit "as contrary to the law and the evidence." It appears that the plaintiff-appellant was the outgrowth of an organization previously known as Honolulu Lodge No. 800 Loyal Order of Moose of the World. In this body two factions were created by reason of intestine disturbance and one faction was eventually granted a charter of incorporation by the Territory of Hawaii under the name of Honolulu Lodge No. 800 Loyal Order of Moose of the World; that on the 15th day of January, 1915, an amendment of the charter of incorporation was granted by which the name was changed to Honolulu Lodge No. 1 Modern Order of Phoenix; that at the time of the incorporation of the plaintiff-appellant it was the alleged owner and in possession of the bonds in question and their custody reposed in a board of trustees consisting of three persons, one of whom was treasurer; that the treasurer had physical possession of the bonds; that in May, 1914, the treasurer, William Armstrong, feloniously converted said bonds and placed them for sale with the defendant-appellee, who during the same month sold them for \$1921.50, and delivered the proceeds, less commissions, to Armstrong; that plaintiff-appellant never received the proceeds of the sale of these bonds; that the bonds were first mortgage coupon bonds of the denomination of \$1000 payable to bearer twenty years after date, with interest, from date until maturity at the rate of six per cent. per annum, payable semi-annually.

The plaintiff-appellant asserts "that the bonds in question were non-negotiable choses in action to which the defendant could not acquire any title from the party embezzling the same, and the rightful owner can hold the defendant liable for damages that it has suffered by reason of defendant's participation in the wrongful conversion thereof;" that the bonds "show on their face that

Opinion of the Court.

they are secured by a mortgage deed of trust to the Bishop Trust Company, Limited, and together constitute one transaction, and by its terms is expressly made subject to all of the provisions of said mortgage deed of trust;" that the bonds "do not contain an 'unconditional promise or order to pay a sum certain in money' to qualify them as negotiable instruments under the provisions of section 3451 of the R. L. of H. 1915, for the reasons, first, that they contain an order or promise to pay out of a particular fund, which disqualifies them as negotiable instruments under the provisions of section 3453 of the R. L. of H. 1915; second, payment is ratable; and, third, the time of payment upon default may be waived at the option of the trustee or by requisition of a majority of the bond holders;" that the bonds "do not contain an unconditional promise or order to pay a 'sum certain in money' as provided by section 3451 R. L. H. 1915, for the reasons, first, payment is ratable; second, payment is to be made out of a particular fund; third, discharge, upon requisition of 3/4 of the bond holders, by payment in shares, stocks, indenture or mortgage; and, fourth, discharge, with consent of a majority of bond holders by purchase of property for amount of outstanding bonds."

The trust company never had any notice that Armstrong was not the owner of the bonds or any knowledge that the same had been stolen until long after it had sold them.

The bonds in question were secured by the usual mortgage trust deed employed in transactions of this nature, which deed does not contain any stipulations or conditions inconsistent with or repugnant to the terms of the bonds. They are a type of bond in common commercial use, considered by the business world as negotiable instruments and have been held so to be by the courts, and

Opinion of the Court.

to hold them other than negotiable instruments would spread consternation, disaster and distress in financial circles generally.

In discussing the negotiability of corporate bonds such as those in question it is said:

"These instruments are a modern financial invention. They are as is well known issued by the United States government, by the governments of the several states, by the governments of the territories, as well as by municipal corporations, and railway, canal, steamboat, mining, manufacturing, and other incorporated companies. Such bonds, whether the coupons are attached or detached, are, when they employ negotiable words, as when they are made payable to the bearer, the holder, or to order almost universally held to be negotiable instruments, possessing the ordinary incidents of such instruments, although they may be issued under seal. This is true of corporate bonds which have been indorsed by the state. It is especially true where the law of the state under whose laws they are issued has abolished the use of private seals." 10 Cyc. 1172.

"Bonds with coupons, payable to bearer, are negotiable securities, and pass by delivery, and, in fact, have all the qualities and incidents of commercial paper." *Thompson v. Lee County*, 3 Wall. (U. S.) 327, 331.

"That these securities (bonds) are treated as negotiable by the commercial usages of the whole civilized world, and have received the sanction of judicial recognition, not only in this court (see *White v. Vermont Railroad Co.* 21 How. 575) but of nearly every State in the Union, is well known and admitted." *County of Mercer v. Hacket*, 1 Wall. (U. S.) 83, 95.

"3. That the bonds were not negotiable. This objection is also unsound. The bonds were payable 'to the bearer, or, when registered, to the registered owner thereof;' were declared to be due on or before December 1, 1901, and were redeemable by annual drawings conducted under the supervision of the Trust Company. It was not known which bonds it would redeem in any one year, as this was to be determined by drawings; but

Opinion of the Court.

its promise was to redeem all of them before December 1, 1901. Considering the nature of corporate bonds, and the difficulty of redeeming so large a number and amount upon any one day, we do not think the fact that they were redeemable by instalments, determined by drawings, impaired their negotiability. Promissory notes much more indefinite as to their time and payment have been held to be negotiable. *Stevens v. Blunt*, 7 Mass. 240; *Goodloe v. Taylor*, 3 Hawks, 458; *Cota v. Buck*, 7 Metc. 588; and in *Goshen Etc. Turnpike Road v. Hurtin*, 9 Johns. 217, it was held directly 'that a promise in writing to pay a certain sum' in such manner and proportion, and at such time and place, as he shall from time to time require, is a promissory note.

"It is at least doubtful whether the fact that these bonds were or were not negotiable is a material one; but assuming it to be such, we think they were negotiable within the meaning of the law." *Dickerman v. Northern Trust Co.*, 176 U. S. 181, 194.

"A municipal bond, issued under the authority of law, for the payment, at all events, to a named person or order, a fixed sum of money, at a designated time therein limited, being indorsed in blank, is a negotiable security within the law merchant.

"Its negotiability is not affected by a provision of the statute under which it was issued that it should be 'payable at the pleasure of the district at any time before due.'" *Ackley School District v. Hall*, 113 U. S. 135.

"A coupon accompanying a corporate bond, which contains an express promise that the corporation will pay the bearer a stated sum as interest at a stated bank on a certain day, and is signed by the treasurer of the corporation, is a negotiable instrument." *Fox v. Hartford & W. H. H. R. Co.*, 38 Atl. (Conn.) 871.

These bonds are a general pledge of the corporation's credit and payment of the same is restricted to the so-called sinking fund but can be enforced against all assets of the corporation.

The bond provides that the Olaa Sugar Company, Limited, "For value received promises to pay to the

Opinion of the Court.

bearer hereof One Thousand Dollars (\$1000) * * * twenty (20) years from the date hereof." There is no condition as to what fund the bond shall be paid out of. It is a general and unqualified promise to pay.

We are clearly of the opinion that the bonds are negotiable instruments. To hold otherwise, as said by Mr. Justice Field in *Cromwell v. County of Sac*, 96 U. S. 51, "would throw discredit upon a large class of securities issued by municipal and private corporations." And these bonds being negotiable, it follows therefore that the defendant-appellee had the right to accept them for sale and to sell them.

"One who had stolen coupon bonds payable to bearer pledged the same to a bank in the ordinary course of business, without any circumstances placing the bank on inquiry. *Held*, that the bank took a good title thereto as against the true owner." *Cochran v. Fox Chase Bank*, 58 Atl. 117.

A *bona fide* holder for value, of a lost or stolen negotiable bond taken in the usual course of business acquires a good title thereto, even as against him from whom it was stolen. 9 C. J. 63; *Shaw v. Merchants' Nat. Bank of St. Louis*, 101 U. S. 557.

The exception is overruled.

Peters & Smith for plaintiff.

Thompson & Cathcart for defendant.

Syllabus.

K. TOMISHIMA v. P. F. HURLEY.

No. 1102.

ERROR TO CIRCUIT COURT, FOURTH CIRCUIT.

HON. C. K. QUINN, JUDGE.

ARGUED OCTOBER 2, 1919.

DECIDED OCTOBER 8, 1919.

KEMP AND EDINGS, JJ., AND CIRCUIT JUDGE FRANKLIN,
IN PLACE OF COKE, C. J., ABSENT.

APPEAL AND ERROR—*void default judgment—appeal therefrom.*

The general rule that an appeal or writ of error does not lie from a judgment by default without first moving to have the default set aside does not apply where the errors assigned are of such a nature as, if sustained, would render the judgment void.

SAME—*same—defective complaint.*

Where the default judgment is attacked on the ground that the complaint does not state a cause of action and no motion has been made in the trial court to have the judgment set aside the complaint will be liberally construed and supported by every legal intendment and if it states facts sufficient to render the judgment thereon a complete bar to another suit for the same cause of action it will withstand the attack.

OPINION OF THE COURT BY KEMP, J.

This is a writ of error to the circuit court of the fourth judicial circuit from a judgment by default entered against the defendant in said court and assigning as errors that the court erred in entering the judgment in favor of the plaintiff and against the defendant for the reasons (1) that the complaint does not set forth facts sufficient to constitute a cause of action; (2) that the court failed to render a decision in writing stating its reasons therefor; (3) that said judgment is contrary to the law, and (4) that said judgment is contrary to the evidence.

Opinion of the Court.

The plaintiff contends that none of the errors assigned should be reviewed for the reason that a writ of error does not lie from a default judgment without first moving to have the default set aside. He has cited in support of this contention *Luce v. Chin Wa*, 5 Haw. 629; *Kalaniana'ole v. Dimond*, 16 Haw. 153, and *Mills v. Walker*, 18 Haw. 243. We are satisfied that these cases correctly state the law as applicable to the facts with which they deal and so far as the facts of this case are similar to the facts dealt with in those cases they support the plaintiff's contention. But in the case of *Gear v. Henry*, 21 Haw. 101, which so far as we are aware is the latest decision by this court dealing with this question, the general statement that a writ of error does not lie from a default judgment without first moving to have the default set aside was modified to the extent of holding that where the trial court had no jurisdiction of the person of the appellant an appeal may be taken without a preliminary motion in the trial court to set aside the judgment upon the theory that a judgment thus entered is void and for the purpose of revising and purging the record of such judgment an appeal will be allowed even though the defendant was in default.

If then any of the errors assigned are of such a nature as, if sustained, would render the judgment void an appeal or writ of error will lie from such judgment without first moving to have the default set aside. It is undoubtedly true that a question which may not be reviewed upon appeal or error where the defendant has merely failed to raise the question in the court below will not be reviewed upon a writ of error from a default judgment where the trial court has not been given an opportunity to correct the error upon motion to set aside the default. In 2 Cyc. 698 it is said that the question of the sufficiency of evidence must be raised by ob-

Opinion of the Court.

jection in the court below and will not be considered if raised for the first time on appeal.

We also think that the question of whether or not the judge has failed to file a written decision setting forth his reasons therefor is quite analogous to the rule found in many jurisdictions requiring the judge to file his findings of fact and it has been repeatedly held that a failure to make or file findings of fact will not be considered in the absence of a request therefor and an exception to the court's refusal or noncompliance with the request. 2 Cyc. 728-9.

The authorities on the question of whether or not the sufficiency of the complaint may first be raised upon appeal are not entirely in accord. In 2 Cyc. 691 it is said: "While it is the rule in a few jurisdictions that the objection that the complaint does not state facts sufficient to constitute a cause of action is waived by a failure to raise that objection below in some appropriate manner it is well settled in most jurisdictions that an objection of this character may be urged for the first time on appeal. Nevertheless the reviewing court does not look upon such an objection with favor and the complaint will be construed liberally and supported by every legal intendment and if it states facts sufficient to render the judgment thereon a complete bar to another suit for the same cause of action it will withstand the attack."

In view of the authorities which we have cited and referred to we think that none of the errors assigned should be reviewed unless it be the one alleging that the complaint does not state facts sufficient to constitute a cause of action. If a complaint upon which a default judgment is based is so defective in substance as to wholly fail to state a cause of action it may be that the judgment will be void and under the holding of *Gear v. Henry*, *supra*, the same would be subject to appeal or

Opinion of the Court.

error without the necessity of first moving to have the default set aside. But in an examination of the complaint for the purpose of determining whether or not it does state facts sufficient to constitute a cause of action it would be our duty to liberally construe it and support it by every legal intendment. The charging part of the complaint in this case is as follows: "For that whereas said defendant heretofore, to wit, on or about the 16th day of March, A. D. 1917, was justly indebted to the plaintiff herein in the sum of \$1035.80 for material furnished and provided by plaintiff to said defendant and for services rendered and performed by said plaintiff for said defendant and for money paid and laid out by plaintiff for the use of said defendant at his special instance and request in and upon the performance and construction and in the prosecution and completion of sections 2, 3, 4 and 5 of the Kukaiau section of the belt road in the district of Hamakua, Island and County of Hawaii aforesaid and being so indebted, said defendant did thereafter on the day last aforesaid undertake and faithfully promise to pay the said sum whenever he should thereto be requested; yet said defendant notwithstanding said promise and undertaking has not paid the whole or any part of the said sum as requested to the damage of said plaintiff in the sum of \$1035.80," and concluding with a prayer that "plaintiff have and recover judgment against the said defendant in the sum of \$1035.80 together with interest from March 16, 1917, attorney's commissions and costs hereof." Attached to said petition is an exhibit setting forth in detail the materials and labor furnished.

The principal contention of the defendant is that the complaint does not allege that the said materials and labor were furnished to the defendant at his special instance and request, it being his contention that the phrase "at his special instance and request" as used in

Opinion of the Court.

said complaint relates only to the money paid and laid out by the plaintiff for the use of said defendant and does not relate to the materials furnished and the services rendered as stated in said complaint, and that thus construed the allegation of the complaint that the defendant thereafter promised to pay the said sum whenever he should thereto be requested is not supported by any consideration.

Bearing in mind, however, that the complaint must be liberally construed and supported by every legal intentment and upheld if it sets forth facts sufficient to render the judgment thereon a complete bar to another suit for the same cause of action we think that the complaint in this case must be sustained; that it states a cause of action and is sufficient to support the judgment rendered thereon, and would enable the defendant to plead said judgment in bar of another suit on the same cause of action. By this we are not to be understood as holding that the complaint would have successfully withstood this attack if made by special demurrer. What we do hold is that in the absence of any demurrer the complaint is sufficient.

The judgment is affirmed.

E. C. Peters (*Peters & Smith* on the brief) for plaintiff in error.

N. W. Aluli (*W. H. Beers* with him on the brief) for defendant in error.

Opinion of the Court.

IN THE MATTER OF THE PETITION OF THE
TERRITORY OF HAWAII TO REGISTER AND
CONFIRM ITS TITLE TO THE AHUPUAA OF
KIOLOKU IN THE DISTRICT OF KAU, ISLAND
AND COUNTY OF HAWAII, TERRITORY OF
HAWAII.

No. 1212.

MOTION TO DISMISS WRIT OF ERROR.

ARGUED OCTOBER 6, 1919.

DECIDED OCTOBER 8, 1919.

KEMP AND EDINGS, JJ., AND CIRCUIT JUDGE BANKS
IN PLACE OF COKE, C. J., ABSENT.

Per Curiam: This is an action to dismiss the writ of error herein on the ground that the opening brief of the Territory of Hawaii, plaintiff in error, which contains more than twenty-five pages, does not contain on its front fly leaves a subject index with references to the pages of the brief as required by paragraph 4 of Rule 3 of this court. Paragraph 1 of Rule 3 of this court prescribes the time in which the appellant shall file his opening brief and sets forth what said brief shall contain and the order in which it shall appear; paragraph 2 prescribes the time within which the appellee's brief shall be filed and what it shall contain; paragraph 3 prescribes the time within which the reply brief of the appellant shall be filed and what it shall contain; paragraph 4 provides that "every brief of more than twenty-five pages shall contain on its fly leaves a subject index with references to the pages of the brief;" paragraph 5 provides for the order of filing briefs in cases before this court upon reserved questions; paragraph 6 prescribes

Opinion of the Court.

what shall constitute a compliance with these rules when the briefs are sent by mail; paragraph 7 is in part as follows: "When, according to the foregoing provisions of this rule, an appellant is in default, the case may be dismissed."

The clear intention of the rule is to leave it discretionary with this court whether or not the extreme penalty of this rule should be inflicted for every failure to comply with the provisions as to filing of briefs and as to the subject matter which said briefs should contain.

We have recently held in the case of *Keahilihau v. King*, ante p. 139, that where the appellant failed to file any brief within the time allowed and his conduct showed a decided laxness in the prosecution of his appeal the extreme penalty provided by this rule was none too severe and in that case the extreme penalty was inflicted. But the default of the plaintiff in error in this case is a failure to comply with a provision of such minor character that it seems to us to inflict the extreme penalty of this rule would work a hardship not warranted by the circumstances.

The motion is therefore overruled and the plaintiff in error is granted forty-eight hours from and after the filing of this opinion within which to file with the clerk of this court the subject index with references to the pages of the brief as required by said rule, and a failure to comply within this time will subject the writ of error to dismissal.

A. G. M. Robertson for the motion.

J. Lightfoot, First Deputy Attorney General, contra.

Opinion of the Court.

MARY SANDERSON *v.* THOMAS SANDERSON.

No. 1218.

MOTION FOR SUIT MONEY, COUNSEL FEES AND TEMPORARY
ALIMONY PENDING APPEAL.

ARGUED OCTOBER 6, 1919.

DECIDED OCTOBER 8, 1919.

KEMP AND EDINGS, JJ., AND CIRCUIT JUDGE BANKS
IN PLACE OF COKE, C. J., ABSENT.

Per Curiam: This is a motion by Mary Sanderson, libellant in the above entitled cause, praying that she be granted and allowed her expenses together with costs incurred and to be incurred in this court, temporary alimony and counsel fees for the preparation and presentation of this appeal.

The facts and circumstances surrounding this cause which we think necessary to an understanding of the question presented are as follows: An action of divorce having been instituted by the said Mary Sanderson the circuit judge before whom the action was pending entered an order requiring the libellee to pay to the libellant temporary alimony, counsel fees and costs of court, the temporary alimony to be paid until the further order of that court. The libellee in response to the libel filed his answer and cross-libel and upon a hearing the libel was dismissed and the libellee granted a divorce upon his cross-libel. The decision was rendered granting the libellee a divorce upon his cross-libel upon the 2d day of May of this year. On the 8th day of May libellant filed her motion before the circuit judge asking that she be granted suit money and counsel fees to defray the expenses of an appeal to the supreme court from the decision and decree dismissing her libel and granting the

Opinion of the Court.

libellee a divorce upon his cross-libel and praying further that the libellee be required to provide the necessary appeal bond, or in lieu thereof to deposit the sum of \$50 in this court as by statute provided. This motion was heard by the circuit judge and after a hearing all of the relief prayed for was denied. Again, on the 24th day of July of this year, the libellant moved the circuit judge before whom the matter was pending that she be granted temporary alimony pending her appeal, which upon hearing was also denied. The libellee having failed to comply with the order of the circuit judge entered immediately after the filing of the libel commanding him to pay temporary alimony, counsel fees and costs of court the libellant procured an order from the circuit judge commanding the libellee to appear before him at a time and place certain to show cause why he should not be adjudged guilty of contempt for a failure to comply with said order. After a hearing upon said order to show cause on the 24th day of July of this year the libellee was by the circuit judge discharged. The libellant having perfected her appeal and the cause being now pending in this court the motion first referred to, and upon which argument has been heard, was filed in this court.

The principal question which has been argued in this court is as to the authority of this court in any event to grant temporary alimony, counsel fees and expenses, but we do not deem it necessary or proper under the circumstances of this case for us to decide that question. The libellant has had the same request twice refused by the circuit judge after a hearing upon the facts.

The refusal of the circuit judge to grant her the temporary alimony, counsel fees and expenses in the preparation and presentation of the appeal of said cause has been included in the appellant's notice of appeal and will no doubt be inquired into when the case is finally pre-

Syllabus.

sented in this court and the relief denied by the circuit judge allowed if the decision below is found to be erroneous. Under these circumstances we think that it would not be proper, granting that we have the authority, to enter any order at this time requiring the libellee to pay to the libellant alimony, counsel fees or expense money.

The motion is denied.

H. L. Grace for the motion.

A. M. Cristy contra.

HAWAIIAN TRUST COMPANY, LIMITED, TRUSTEE
UNDER THE WILL OF GEORGE GALBRAITH,
DECEASED, *v.* THOMAS GALBRAITH, ANNIE
GALBRAITH, ALBERT GALBRAITH, ALEX-
ANDER GIBB GALBRAITH AND ADA GAL-
BRAITH.

No. 1200.

APPEAL FROM CIRCUIT JUDGE, FIRST CIRCUIT.

HON. W. H. HEEN, JUDGE.

ARGUED OCTOBER 10, 1919.

DECIDED OCTOBER 14, 1919.

KEMP AND EDINGS, JJ., AND CIRCUIT JUDGE DEBOLT IN
PLACE OF COKE, C. J., ABSENT.

ANNUITIES—*nature of interest—assignment.*

Where property was given by will to a trustee to hold until the death of the last survivor of a number of annuitants and for twenty-one years thereafter to pay certain annuities and to accumulate the unpaid income and then divide the trust estate "among those persons entitled at that time to the aforementioned annuities" an annuity payable to A. J. G. "for life and then to their

Opinion of the Court.

heirs" the interest of the heirs in the annuity was an estate of inheritance and was assignable.

OPINION OF THE COURT BY KEMP, J.

This is an appeal from a decree of a circuit judge sitting in equity in a suit instituted by the Hawaiian Trust Company, Limited, trustee under the will of George Galbraith, deceased, for instructions regarding the payment of a certain annuity as to which conflicting claims have arisen and as to the proper disposition of which the trustee is in doubt.

George Galbraith, a former resident of Hawaii, now deceased, by his last will and testament duly admitted to probate, devised and bequeathed to the plaintiff a large estate charged with certain trusts, the said trust to continue "for as long a period as is legally possible, the determination or ending of such trust to take place when the law requires it under the statute." Included among the trusts referred to is the payment of annuities to various named annuitants. With reference to a large number of these, and which include the annuity involved herein, they are bestowed "for life and then to their heirs."

The particular fund involved in this suit is a portion of an annuity bequeathed to Ann Jane Galbraith. The record before us establishes the fact that Ann Jane Galbraith, a spinster, died intestate on or about the 3d day of December, 1909, leaving surviving her as one of her heirs a nephew, George Galbraith, the younger, of Glen Gormley, Antrim County, Ireland, who thereupon became entitled to \$6.82 annually as his share of said annuity. Thereafter on October 4, 1910, the said George Galbraith assigned his share of the said annuity to his brother Thomas Galbraith, one of the defendants herein. Subsequent to said assignment and on the 24th day of

Opinion of the Court.

November, 1917, the said George Galbraith died intestate, being at the time of his death a citizen of Great Britain domiciled at Glen Gormley, County of Antrim, Ireland, leaving surviving him a widow, Annie Galbraith, and three children, Albert Galbraith, Alexander Galbraith and Ada Galbraith, minors, all still surviving and defendants herein. It is claimed by the said widow and children of George Galbraith that under the terms of said will George Galbraith had the right to assign his share of said annuity only for the duration of his own life and that on his death the said assignment ceased to have any further force or effect and that thereupon the said widow and children as his heirs became entitled to receive his share of the annuity accruing after his death.

It is claimed by the said Thomas Galbraith that the said assignment of George Galbraith carried his share of the annuity not only during his life but also during the remainder of the trust period and both as against said George Galbraith and as against the heirs and that therefore he, the said Thomas Galbraith, is entitled to continue to receive the said share of the annuity which would be due to the heirs of George Galbraith but for his assignment.

The facts thus presented are identical with the facts presented in the case of *Hawaiian Trust Co. v. McMullan*, 23 Haw. 685, with the single exception that in the *McMullan* case the annuity had not been assigned. In this case, as in the *McMullan* case, the question to be determined is as to the quality of interest which the heirs take under the clause of the will granting annuities to certain named persons "for life and then to their heirs." In the *McMullan* case it was held that ordinarily a gift of an annuity to a person without words of limitation or other significant language is to be regarded as a gift of the annuity during the life of the annuitant and a gift

Opinion of the Court.

of the annuity to one for life and then to another is understood to mean to that other for life unless a different intent is indicated. In that case the final clause of the will, which provides that "on the final ending and distribution of the trust the trust fund to be divided equally amongst those persons entitled at that time to the aforementioned annuities," was held to disclose the intent on the part of the testator that the annuities given to the heirs were not to terminate at their respective deaths but were to continue for the period during which the trust was designed to continue.

In the *McMullan* case, which determined the quality of interest which the heirs took under the will in question, the court, in speaking of the interest of William McVeigh, who stood exactly in the same relation to the annuity there involved as did George Galbraith to the annuity here involved, said, "The interest of William McVeigh in the annuity, then, was for the entire period of the trust if he should live till the arrival of the time for the distribution of the estate, and, if not, for his heirs or personal representatives during the life of the last survivor of the annuitants and for the further period of twenty-one years." Counsel for the heirs of George Galbraith have contended that many of the expressions in the *McMullan* case are mere dictum, but it cannot be contended that it was unnecessary for the court in that case to determine the quality of the interest which William McVeigh took under said will, and the quotation last above is the court's final summing up of the character or quality of the interest which the said William McVeigh took under said will and is just as applicable to the interest which George Galbraith took under said will. If upon the death of William McVeigh his interest in the annuity would descend to his heirs or personal representatives he must have possessed an estate of in-

Syllabus.

heritance in said annuity, or, to express it in another way, must have owned the said annuity in fee simple, which carried with it the right to dispose of said annuity by will or assignment.

We hold that the circuit judge was right in directing the trustee to pay the annuity previously paid to George Galbraith to the said Thomas Galbraith and his heirs, executors, administrators or assigns.

The decree appealed from is affirmed.

R. B. Anderson and *U. E. Wild* (*Frear, Prosser, Anderson & Marx* on the brief) for petitioner.

W. L. Stanley for Thomas Galbraith.

Watson & Clemons, for certain respondents, submitted the case upon the brief.

THE ESTATE OF S. G. WILDER, LIMITED, *v.*
INTER-ISLAND STEAM NAVIGATION COM-
PANY, LIMITED.

No. 1191.

RESERVED QUESTION FROM CIRCUIT COURT, FIRST CIRCUIT.
HON. J. T. DEBOLT, JUDGE.

SUBMITTED OCTOBER 14, 1919.

DECIDED OCTOBER 15, 1919.

KEMP AND EDINGS, JJ., AND CIRCUIT JUDGE FRANKLIN IN
PLACE OF COKE, C. J., ABSENT.

LANDLORD AND TENANT—*leases—covenants.*

A covenant in a lease that the lessee will during the term pay all taxes, water rates and assessments of every description which may be payable in respect of said premises to whomsoever levied or assessed is an obligation to pay assessments for street improve-

Opinion of the Court.

ments even though such assessments are levied under an ordinance passed subsequent to the execution of the lease.

OPINION OF THE COURT BY EDINGS, J.

The plaintiff is the lessor named in a certain indenture of lease wherein the Wilder Steamship Company, Limited, is named as lessee, which said indenture of lease is dated September 30, 1904. The defendant is the assignee of said lessee with the permission of the lessor, and, as such assignee, is required to observe and carry out all of the provisions and covenants in said lease contained required to be observed and performed by the lessee named therein. Pursuant to law an assessment for street improvements was levied against the property demised by said lease amounting to the sum of one thousand eight hundred and fifty-three and 75/100 dollars (\$1853.75), which said assessment was due and payable on the 9th day of May, 1919, or in yearly instalments beginning on said day. Demand was made by plaintiff upon defendant that it pay said assessments but defendant refused to pay the same, and on said 9th day of May, 1919, plaintiff paid the entire amount thereof and instituted an action against defendant to recover said amount; that one of the covenants in said lease contained is as follows: "And the lessee doth hereby covenant with the lessor that it will during said term pay the said rent at the time and in the manner aforesaid and also will from time to time pay all taxes, water rates and assessments of every description which may be payable in respect of said premises to whomsoever levied or assessed."

Plaintiff claims that under said covenant above quoted defendant is legally required to pay said street assessment, which claim defendant denies.

The circuit judge before whom the cause was pending

Opinion of the Court.

reserved the following question for the consideration of this court:

“Whether the covenant above quoted requires the lessee named in said lease, or its assignee, to pay the assessment levied against the demised premises for the purpose of street improvements, as indicated by the exhibits attached to said complaint.”

The exhibits referred to show the levy of the assessment for street improvements, and the amount thereof, as herein set forth.

The plain and legal meaning of the phrase “assessments of every description,” contained in the lease, includes every description of assessments for improvements classified as such by the governmental power imposing the obligation. This imposition of a burden for street improvements is almost universally termed an assessment by authorities upon this subject, and this meaning has been adopted and used by this court whenever called upon to designate this species of tax. *Taylor v. City & County of Honolulu*, 25 Haw. 58; *McCandless v. City & County of Honolulu*, 24 Haw. 524. Municipal assessments, technically so-called, Cooley, *Taxation*, 416; Hilliard, *Law of Taxation*, 364. In *Taylor v. Palmer*, 31 Cal. 241, 254, the court say: “What, then, is the power of assessment, and, if any, what are its limitations? * * * At the time the Constitution was framed this word had, in the connection in which it is used, obtained a popular and legal signification which was well understood. Moreover, the provision of the Constitution in which it is found was borrowed from the Constitution of New York, where, as well as in other States, the word had already received a judicial interpretation. The Constitutional Convention must therefore be understood to have used the word in the sense in which it had been used in the Constitution from which it was

Opinion of the Court.

taken, which also was its popular sense. It was employed therefore to represent those legal burdens imposed by municipal corporations upon property bordering upon an improved street or situated so near it as to be benefited by the improvement, for the purpose of paying the cost of the improvement." See also *Mardis v. McCarthy*, 162 Cal. 94, 101; *Palmer v. Stumph*, 29 Ind. 329, 334; *Hale v. City of Kenosha*, 29 Wis. 599. Assessments are not synonymous with taxes and include special amounts levied for betterments, as roads, etc. *Matter of City of New York*, 192 N. Y. 459; *Ittner v. Robinson*, 35 Neb. 133, 137.

There seems to be little conflict in the law upon the subject at the present day.

"A covenant that the lessee shall pay all rates, taxes, and assessments for which the premises shall be liable includes not only such charges as may be imposed by laws then in force, but also such as may be authorized by laws afterwards enacted." 16 R. C. L. Sec. 310.

"And if the tenant's covenant includes all burdens during the term, he is liable, even though the assessment is not laid or the law imposing the assessment is not passed until after the lease is made." Taylor, *Landlord & Tenant*, 8 ed., Sec. 398.

"Under a covenant to pay 'all taxes, assessments, rates and charges assessed or made on the demised premises,' the tenant is bound to pay an assessment upon the premises, although the act under which it was assessed was passed subsequent to the making of the lease. If the assessment is a permanent improvement to the property, as for the paving of the street, the laying of a sewer, or the building of a sluice, the tenant is nevertheless bound to pay it if it is a valid assessment, as if he desired to limit his liability he should have seen to it that the language of his covenant was restricted so as to cover only ordinary assessments or taxes." Wood, *Landlord & Tenant*, p. 691.

Nor can it be successfully contended that the parties

Syllabus.

to the lease did not have in contemplation assessments of this nature as the statutes of this Territory (the Kingdom) contained, long prior to the execution of this lease, provisions for street and road improvements, and therein designated the obligation of abutting property owners as "assessments." Ch. VIII, S. L. 1870.

The question reserved to this court is answered in the affirmative.

Frear, Prosser, Anderson & Marx for plaintiff.

Smith, Warren & Whitney for defendant.

L. L. McCANDLESS *v.* W. R. CASTLE, TRUSTEE
UNDER THE WILL OF JOSHUA R. WILLIAMS,
DECEASED, KAHALAUOLA WILLIAMS, ROSE
WILLIAMS, HENRY WILLIAMS, EDWARD
WILLIAMS, GEORGINA WILLIAMS, JOSE-
PHINE BOYD, GEORGINA WRIGHT, LYDIA
MOLDENHAUER AND JOSHUA WILLIAMS.

No. 1149.

TAXATION OF COSTS.

ARGUED OCTOBER 16, 1919.

DECIDED OCTOBER 17, 1919.

KEMP, J., AND CIRCUIT JUDGES FRANKLIN AND DEBOLT IN
PLACE OF COKE, C. J., ABSENT, AND EDINGS, J.,
DISQUALIFIED.

Costs—equity cases—on appeal.

Sec. 2548 R. L. 1915, which provides that "If the defendant against whom judgment is rendered appeal and the amount recovered in the court below be reduced one-fifth or more costs

Opinion of the Court.

shall be awarded to the appellant," governs the allowing and taxing of costs on appeal in equity cases, and where the decree appealed from is reduced one-fifth or more the appellant is entitled to his costs of appeal.

OPINION OF THE COURT BY KEMP, J.

This was an appeal in a suit in equity for an accounting. The suit was instituted in the circuit court by L. L. McCandless against W. R. Castle, trustee under the will of Joshua R. Williams, deceased, and the various beneficiaries under the will, praying for an accounting of a portion of the income of the trust estate. A decree was rendered in favor of McCandless and against all of the respondents, from which all of the respondents appealed.

Upon a hearing in this court an opinion was rendered sustaining that portion of the decree appealed from holding complainant to be entitled to an accounting but finding that the accounting should be based on a different set of facts from those set forth in the decree of the circuit judge and remanding the cause with instructions to modify the decree to conform to the views therein expressed. *McCandless v. Castle*, 25 Haw. 22.

The appellants have now filed a motion to have their costs allowed and taxed and said motion is accompanied by the affidavit of appellants' attorney to the effect that the decree appealed from has been reduced by more than one-fifth by the decision on appeal. This fact is not controverted by complainant. In fact it is admitted by his counsel and is borne out by a comparison of the decree appealed from with the opinion of this court.

Appellants claim to be entitled to have their costs on appeal allowed and taxed under section 2548 R. L. 1915, as construed and applied in the case of *Magoon v. Lord-Young Co.*, 23 Haw. 187. In this case the court recog-

Opinion of the Court.

nized the principle that under the rule in equity cases the costs are in the sound discretion of the court, but held that that rule applies only to costs incurred in the trial court, and further held that under our statute the costs of appeal go to the party who prevails on appeal irrespective of which party may eventually recover the costs of trial in the court below. The particular portion of section 2548 R. L. 1915 upon which appellants rely in this case is as follows: "If the defendant against whom judgment is rendered appeal and the amount recovered in the court below be reduced one-fifth or more costs shall be awarded to the appellant."

In view of this statute and the holding of this court in *Magoon v. Lord-Young Co., supra*, to the effect that section 2548 R. L. 1915 governs the allowing and taxing of costs on appeal we are unable to see how the complainant can escape liability for the costs on appeal in this case.

There being no dispute as to the correctness of the cost bill filed the costs are allowed and taxed against the complainant in accordance with the cost bill on file in the sum of \$77.80.

A. G. Smith for complainant.

Arthur Withington for respondents.

Syllabus.

SOLOMON K. LO AND MARY K. LO, HIS WIFE, v.
THE FIRST TRUST COMPANY OF HILO,
LIMITED.

No. 1213.

APPEAL FROM CIRCUIT JUDGE, FOURTH CIRCUIT.
HON. C. K. QUINN, JUDGE.

ARGUED OCTOBER 20, 1919.

DECIDED OCTOBER 22, 1919.

KEMP AND EDINGS, JJ., AND CIRCUIT JUDGE FRANKLIN
IN PLACE OF COKE, C. J., ABSENT.

CONTRACTS—*modification—requisites of modifying agreement.*

It is competent for the parties to a simple contract in writing to modify it or to vary or qualify its terms by oral agreement and thus make it a new one, but the new agreement must have all the requisites of a valid or enforceable agreement or it will not be binding. While no particular form is required mere indefinite expressions cannot constitute a modification.

OPINION OF THE COURT BY KEMP, J.

This is an appeal by the complainants from a decree dismissing their bill. The suit was instituted by Solomon K. Lo and Mary K. Lo, his wife, against The First Trust Company of Hilo, Limited, a corporation, seeking the specific performance of a contract and for an accounting. It appears that on the 18th day of May, 1917, the complainants and the respondent entered into a written contract or agreement whereby the complainants were to, and did, convey to the respondent that certain premises in the city of Hilo known as the Lo property. In consideration of this conveyance the respondent agreed upon certain conditions, hereinafter set forth, to convey to the complainants certain other property situated in the city of Hilo and known as the Bischoff property and to pay to

Opinion of the Court.

the complainants the sum of \$2000. The condition upon which the conveyance by the respondent to the complainants of the Bischoff property was to be made and the \$2000 paid was that the respondent should apply to the land court to register its title to the property conveyed to it by the complainants and if upon such application its title should be registered and confirmed as an unincumbered title in fee simple to the whole of said property conveyed then the respondent would convey to the complainants the Bischoff property and pay to said complainants the said sum of \$2000, but if the land court should fail or refuse to decree to respondent an unincumbered title in fee simple to the whole of said property then the respondent to reconvey to the complainants by quitclaim deed the whole of said property theretofore conveyed to it and the respondent to be under no further obligation to pay any consideration whatsoever to the complainants, the complainants agreeing in this event to reimburse the respondent for all expenses including court costs, attorney's fees and other expenditures in connection with the application to register the title to said land. It is the claim of complainants that subsequent to the execution of said contract the same was modified by an oral agreement entered into between complainants and respondent on or about the 20th day of November, 1917, whereby the respondent agreed that if the complainant Solomon K. Lo would have his life insured in the sum of \$5000 in favor of the respondent respondent would pay all premiums on said life insurance policy and would convey to complainants the Bischoff property and pay them the said sum of \$2000 regardless of whether it secured the registered title to the Lo property in fee simple; that the proposition was accepted by the complainants and the life insurance policy procured upon the life of said complainant in favor of said respondent.

Opinion of the Court.

The complainants sought to establish the modification of the written contract and to have specific performance thereof as modified. The respondent admits the contract of May 18, 1917, but denies the oral modification of November 20 as claimed by complainants. If the modification of the contract was established the complainants are entitled to the relief sought. On the other hand, if they failed to establish the modification they have failed to show a right to any relief.

Upon the trial it was stipulated by the parties that the respondent in accordance with the contract of May 18, 1917, filed in the land court of the Territory of Hawaii a petition to have confirmed in it the unincumbered fee simple title to the Lo property and prosecuted said petition to final decree; that said petition was duly heard and it was finally decreed that the title of said Solomon K. Lo, and the title of his grantee in said land, was derived from J. W. K. Lo by deed dated February 9, 1911, and that said deed vested in said Solomon K. Lo only a life estate for the life of him the said Solomon K. Lo, and that his subsequent grantee obtained from him only such life estate and was not entitled to the fee simple title, which said decree is now, as then, of full force and effect.

The controversy therefore centered around the question of whether or not there had been a modification of the original contract as claimed by complainants. The circuit judge found against the claim of complainants and dismissed their bill. In this we think he was amply justified by the evidence, both oral and documentary. It is competent for the parties to a simple contract in writing either altogether to waive, dissolve or abandon it, to add to, change or modify it or to vary or qualify its terms and thus make it a new one. In such case the contract must be proved partly by the written and partly by the subsequent oral contract which has thus been incorporated

Opinion of the Court.

into and made a part of the original one. (6 R. C. L. p. 914, Sec. 299.) The new agreement must have all the requisites of a valid or enforceable agreement or it will not be binding. While no particular form is required mere indefinite expressions cannot constitute a modification. (13 C. J. p. 590, Sec. 605.)

The transaction of November 20, 1917, which resulted in the insurance of the life of the complainant Solomon K. Lo, the circumstances of which are testified to both by the complainants and Mr. Mariner, an official of the respondent corporation, does not in our opinion show a modification of the original contract. The most that can be said of this evidence, when viewed most favorably for the complainants, is to the effect that after it had been ascertained that the complainant Solomon K. Lo possessed only a life estate in the Lo property and therefore could convey to the respondent only such life estate the respondent requested the complainant Solomon K. Lo to have his life insured in its favor in order to protect it against loss by reason of its failure to procure the fee simple title to the Lo property.

It is shown by uncontroverted evidence that between the time of the execution of the contract of May 18, 1917, and the 20th of November, 1917, when said insurance was procured, that the complainants had become indebted to the respondent in a sum in excess of \$1000 and it is shown by credible evidence that this sum exceeded \$2000. There is also ample evidence to justify the conclusion that the respondent desired this insurance upon the life of complainant to secure it against loss by reason of these advancements. At any rate there is nothing in the testimony of any of the witnesses which shows a definite agreement between the parties to modify or change any of the terms of the contract as entered into originally. That this was not the intention of the parties to the transaction of November 20, 1917, is further borne out by certain instru-

Syllabus.

ments which were afterwards executed by the complainants on March 9, 1918, one of which was a paid-up lease executed by the complainants to the respondent of the Lo property for the life of said Solomon K. Lo in consideration of the sum of \$3000, the receipt of which is acknowledged, and the other being a relinquishment of all right, title and claim which the complainants had in the Bischoff property and the confirmation of the assignment of the insurance policies on the life of said Solomon K. Lo to said respondent.

We think that the complainants wholly failed to establish the modification of the contract as claimed and have therefore failed to show themselves entitled to any relief.

The decree appealed from is affirmed.

A. G. Correa, for complainants, submitted the case upon the brief.

S. S. Rolph (*Carlsmith & Rolph* on the brief) for respondent.

MAGGIE KUPUKAA v. C. H. GRAY.

No. 1214.

EXCEPTIONS FROM CIRCUIT COURT, FIRST CIRCUIT.

HON. C. S. FRANKLIN, JUDGE.

ARGUED OCTOBER 17, 1919.

DECIDED OCTOBER 24, 1919.

KEMP AND EDINGS, JJ., AND CIRCUIT JUDGE DEBOLT
IN PLACE OF COKE, C. J., ABSENT.

PLEADING AND PRACTICE—*amendments*.

An attempt to change the nature of the action from one in contract to one in tort or *vice versa* is properly not an amendment but a substitution of a cause of action different in nature and sub-

Opinion of the Court.

stance from that originally stated and is unauthorized by the laws of this Territory.

OPINION OF THE COURT BY EDINGS, J.

The plaintiff-appellee filed her declaration in assumpsit in the circuit court of the first circuit of the Territory against Charles H. Gray, administrator of the estate of George Malin, alias George Maliu, alias George Maliu Kanaeholo, deceased, defendant, and Equitable Life Assurance Society of the United States, garnishee. The first count in said declaration is in substance as follows: That the defendant is the administrator of the estate of said George Maliu Kanaeholo, deceased; that on or about the month of May, 1915, the plaintiff at the request of said George Malin agreed to become his housekeeper and as such did all of his cooking, washing and housework, in consideration of which the said George Malin agreed to make suitable provision for plaintiff as hereinafter set forth; that plaintiff continued to perform said services up to and including the 25th day of June, 1918, when the said George Malin died; that in the month of October, 1915, the said George Malin took out a policy of insurance on his life in the Equitable Life Assurance Society of the United States, whereby in consideration of the premium of \$21.44 then paid to said society by the said George Malin, and of the semi-annual premiums of \$21.44 thereafter to be paid, the said society agreed to pay to the heirs, executors, administrators or assigns of the said George Malin, on his death, the sum of \$1000; that at or about the time the said George Malin took out the said policy he declared to plaintiff and others that he took out the policy to make provision for plaintiff for performing her services as his housekeeper and that the policy was hers; that thereupon the said "George Malin for valuable consideration orally assigned the said policy and all moneys to become due and

Opinion of the Court.

payable thereunder to plaintiff (who had an insurable interest in his life), and delivered the said policy to her, and said policy has been in her possession continuously since said assignment until after the death of the said George Malin;" that plaintiff "received no compensation for her services as housekeeper for the said George Malin other than her food, lodging, clothing and the assignment of the said policy;" that in March or April, 1917, the said George Malin informed plaintiff that he could not longer pay the premiums on said policy, whereupon plaintiff paid said premiums in April, 1917, October, 1917, and April, 1918, out of her own funds; "that the services as housekeeper which plaintiff rendered to the said George Malin, in addition to her food, clothing and lodging from May, 1915, to the date of his death, are of the fair value of \$1000;" "that on or about June 26, 1918, the day after the death of the said George Malin, Charles H. Gray, above named, who was not then the administrator of the estate of the said George Malin, and prior to that date was unknown to plaintiff, came to plaintiff's house * * * and asked plaintiff to show him said policy, and represented to plaintiff that it was necessary to have the names in said policy changed, and requested her to hand the same to him for that purpose and he would take it to the insurance company, and plaintiff * * * entrusted the said policy to the said Charles H. Gray for the said purpose." The declaration further recites the appointment of said Gray on August 6, 1918, and that plaintiff is informed and believes that he as such administrator received from said society on said policy the sum of \$1000; "that thereafter plaintiff demanded of defendant that he return the said policy to her, or the proceeds which he recovered under the same, which he refused to do;" "that plaintiff has not proved her claim against the estate of the said George Malin * * * and plaintiff is informed and believes * * * that her claim is not a provable claim against the said estate, but is one

Opinion of the Court.

for money had and received to the plaintiff's use, and that the said sum of \$1000 is not subject to the claim of creditors of the said George Malin;" "that defendant has received the sum of \$1000 to the use of the plaintiff and has not paid the same to her, to the plaintiff's damage in the sum of \$1000." This declaration also contains three additional counts, each of which said counts is alleged to be "a separate and distinct cause of action against defendant."

Numerous amendments to the declaration were offered by the plaintiff-appellee and allowed by the court apparently upon the theory of conforming the pleading to the proof. These various rulings were duly excepted to by the defendant-appellant and are embodied and set forth in his bill of exceptions and consisted in striking out the words "as administrator of the estate of George Malin, deceased," where the same occur, and discontinuing as to the "Equitable Life Assurance Society of the United States, Garnishee," leaving the action against Charles H. Gray in his individual capacity. We do not deem it essential to review each of these exceptions specifically as a dissertation thereupon can serve no useful purpose.

At the close of the evidence, the action being tried by the court without the intervention of a jury, the plaintiff-appellee moved the court to allow an amendment changing the cause of action from assumpsit to trover, which was by the court allowed and exceptions preserved by the defendant-appellant and embodied in his bill of exceptions as numbers 7 and 8.

In conformity to this amendment the declaration contained solely the common law count of trover, founded on the same fiction that the defendant found the goods in question, namely, the policy of insurance, being the property of plaintiff.

"It was a general rule of the common law that counts *ex contractu* and counts *ex delicto* could not be joined and it is still held even in some of the code States that an at-

Opinion of the Court.

tempt to change the nature of the action from one in tort to one in contract, or *vice versa*, is properly not an amendment but a substitution of a cause of action different in nature and substance from that originally stated." 1 Enc. Pl. & Pr. 567. Nor do the statutes of this Territory extend or enlarge this rule. Section 2371 R. L. 1915 provides that "Whenever a plaintiff in an action shall have mistaken the form of action suited to his claim, the court or judge, on motion, shall permit amendments to be made on such terms as it or he shall adjudge reasonable; and the court or judge may, in furtherance of justice and on the like terms, at the trial or on appeal, or at any other stage, before or after judgment, allow any petition or pleading or process or proceeding to be amended by adding or striking out the name of any party, or by correcting a mistake in the name of a party or a mistake in any other respect, or by inserting other allegations material to the case, or, when the amendment does not substantially change the claim or defense, by conforming the pleadings or the proceeding to the facts proved."

This amendment permitted by the court for the purpose of allowing the pleadings to conform to the proof was not simply a change in the form of the action, but was a radical change in its substance and was in effect the substitution of an entirely different action from the one at issue and "substantially changed" both "the claim and defense," bringing it clearly within the prohibition of this section (2371). In the case of *Kaco v. Campbell*, 20 Haw. 423, this court held that under this section an amendment to a bill in equity to conform the pleadings to the facts proved will not be allowed when its effect would be to substantially change the petitioner's claim.

These exceptions numbered 7 and 8 are sustained.

H. Edmondson for plaintiff.

F. Schnack for defendant.

Syllabus.

DAVID HURST *v.* PAALANI KUKAHI AND JOHN
T. BAKER.

No. 1216.

APPEAL FROM CIRCUIT JUDGE, FOURTH CIRCUIT.
HON. C. K. QUINN, JUDGE.

ARGUED OCTOBER 21, 1919.

DECIDED OCTOBER 29, 1919.

KEMP AND EDINGS, JJ., AND CIRCUIT JUDGE BANKS IN
PLACE OF COKE, C. J., ABSENT.

SPECIFIC PERFORMANCE.

Specific performance will be decreed of a contract for the sale of land when there does not appear to have been any unfairness, injustice or inequality such as to require a court of equity to refuse its aid and the consideration is not grossly inadequate.

SAME.

One who purchases land with knowledge of a contract of sale thereon is bound by all of the equities enforceable against his grantor as a party to said contract.

OPINION OF THE COURT BY EDINGS, J.

The petitioner-appellee instituted a suit in equity in the circuit court of the fourth circuit of the Territory for specific performance against the respondents-appellants.

The facts found by the trial judge and supported by the evidence are, in substance, that the respondent Kukahi on the 4th day of December, 1916, executed and delivered to the petitioner a certain contract for the sale of land therein set forth, which contract is as follows: "Hilo, Hawaii, December 4th, 1916. Received from David Hurst the sum of ten and no/100 dollars, as part payment for the purchase price of land situate at Puueo and known as Kupihee Estate, Total Purchase Price \$1400.00.

Opinion of the Court.

The balance to be paid upon and after the Abstract of Title is received from Honolulu, and the title to said land found to be my own. P. Kukahi. Witness to signature Jos. S. Ferry," it being agreed that the petitioner was to bear and defray all costs and expenses connected with the sale of the land, such as procuring an abstract, preparing a deed and any attorney's fee for services. On account of delays for which neither the petitioner nor his attorney, J. S. Ferry, was responsible the abstract to the property was not received until the 12th day of April, 1917. After the abstract had been ordered by Ferry, the attorney for petitioner, and prior to its receipt, Mr. O. T. Shipman, the attorney at law of the respondent Baker, on several occasions visited the office of said Ferry on other business connected with Kukahi. At the time of these visits Mr. Shipman knew that Kukahi had agreed to sell the land. On or about the 20th day of June, 1917, petitioner, through his attorney Ferry, presented to respondent Kukahi a warranty deed of said premises and tendered him the balance of the purchase price. The respondent Kukahi refused to execute the deed and requested Ferry to go with him to the office of Mr. Shipman. Upon arriving there Mr. Shipman advised Kukahi not to sign said deed and informed Mr. Ferry that Kukahi had already conveyed the property to the respondent John T. Baker by deed dated April 16, 1917 (Defendants' Exhibit 1). It further appears that prior to February 9, 1917, Kukahi had informed Baker "that he went to Ferry and had signed a paper for him not to sell the land to any one else." About this time the respondent Baker paid a mortgage on this property given by Kukahi to one Peterson and he had sufficient knowledge to put him upon inquiry as to the existence of the "agreement of purchase" and "took with actual knowledge of the agreement."

Opinion of the Court.

We are unable to discover in this transaction any unfairness, injustice or inequality such as to cause a court of equity to refuse specific performance, nor does the price appear inadequate, at least not so inadequate as to warrant the refusal of a court of equity to lend its assistance upon that theory. Nor can the respondent Kukahi complain of laches on the part of petitioner, as he (Kukahi) had prior to April 16 put it out of his power to perform.

The question of laches does not depend upon the fact that a certain definite time has elapsed, but whether under all of the circumstances petitioner is chargeable with a want of *due* diligence. "A delay which neither evidences an abandonment of right nor operates to the prejudice of the other party is not a defense." 36 Cyc. 729, 730; 2 Pomeroy's Equitable Remedies, Sec. 814.

The evidence shows that such delay as there was was not unreasonable, did not operate to the prejudice of the respondent Kukahi and did not evince an intention of abandonment upon the part of the petitioner.

The respondent Baker took with actual knowledge of the existence of the agreement of sale between the petitioner and the respondent Kukahi and is bound by the same equities. *Green v. Pope*, 6 Haw. 235; 39 Cyc. 1648-1703; 36 Cyc. 761.

The decree appealed from is affirmed.

S. S. Rolph (*Carlsmith & Rolph* on the brief) for petitioner.

W. H. Smith for respondents.

Syllabus.

IN THE MATTER OF THE ESTATE OF KAAHANUI
LOPEZ, DECEASED.

No. 1209.

EXCEPTIONS FROM CIRCUIT COURT, FIRST CIRCUIT.

HON. C. W. ASHFORD, JUDGE.

ARGUED OCTOBER 14, 1919.

DECIDED OCTOBER 29, 1919.

KEMP AND EDINGS, JJ., AND CIRCUIT JUDGE BANKS IN
PLACE OF COKE, C. J., ABSENT.*WILLS—testamentary capacity—presumption of law—burden of proof.*

The presumption of law is in favor of testamentary capacity and he who insists on the contrary has the burden of proof, except where insanity in the testator has been shown to exist at a time prior to the execution of the will in which event the proponent must show that it was executed at a lucid interval.

OPINION OF THE COURT BY KEMP, J.

This case was originally a petition for admission to probate of a certain document alleged by the proponent to be the last will and testament of Kaahanui Lopez, deceased. The admission of this document to probate was contested by various heirs at law of the testatrix and persons who would benefit under prior wills made by the testatrix.

The contestants allege in substance that at the time of the execution of the said document, if it ever was executed, the said Kaahanui Lopez was not of sound and disposing mind or capable of executing the alleged will; that said alleged will was never signed by said Kaahanui Lopez, deceased; that said will was executed, if at all, under the undue influence, importunities, suggestions and persuasions of one Kealawaa Johnson, deceased, Antone Peter Johnson, Sarah Johnson and Maria Johnson,

Opinion of the Court.

or some other person or persons, and is not the voluntary act of the said Kaahanui Lopez; that said will was executed, if at all, under the compulsion of threats and duress inflicted upon the said Kaahanui Lopez by the said Kealawaa Johnson or other person or persons who held her, the said Kaahanui Lopez, in confinement and restrained her of her liberty and compelled her to execute the said will; that the said will was procured by the fraud, misrepresentation and artifice of the said Kealawaa Johnson, or other person or persons.

After a trial before the circuit judge, sitting as a judge in probate, a decree was signed refusing to admit the will to probate. Upon the filing of that decree the proponent appealed to a jury, and following the requirements of our statute applicable in such cases four issues were framed by the trial judge for presentation to the jury upon appeal as follows: (1) Was the mind of the testatrix Kaahanui Lopez sufficiently sound at the time she is alleged to have executed the will herein offered for probate to enable her to understand the nature and effect of the alleged will; (2) did the testatrix personally sign the alleged will or expressly direct any one else to sign it for her in her presence; (3) did the testatrix understand fully and clearly the nature and effect of the alleged will at the time of its execution; (4) did the testatrix, whether by herself or by another, sign the alleged will in the presence of two witnesses who at that time at her request and in her presence and in the presence of each other subscribed their names thereto as witnesses. At the conclusion of the trial upon these issues the jury answered each of them in the negative and the case comes to this court upon exceptions by the proponent to rulings made at the trial as well as to the verdict.

The exceptions are too numerous and lengthy to per-

Opinion of the Court.

mit their incorporation in this opinion, but certain of the exceptions clearly present to this court for its determination, for the first time we believe, the question as to which party, the proponent or the contestant, has the burden of proof on the issue of testamentary capacity of the testator.

The decisions of other courts relating to this question fall into two main groups—those which maintain that the burden of proving testamentary capacity is on the proponent forming the one main group, and those which maintain that the burden of proving lack of testamentary capacity is upon the contestant forming the other group. It may be said that the courts of the various States have aligned themselves with the one group or the other according as the proponent of the will is regarded as defendant being attacked by a contestant or as plaintiff attacking the heirs. Those courts which hold to the view that the burden of proving the testamentary capacity of the testator is upon the proponent of the will have generally proceeded upon the theory that those persons who would take as heirs under the statute in the absence of a will have some peculiarly sacred rights which the courts should jealously guard lest the testator do some untoward act in respect to the disposition of his estate to their detriment. These courts also as a rule reject the proposition that testators like other persons are presumed to be sane until the contrary appears—and this upon the theory that wills are usually executed by persons *in extremis*; that a large proportion of them are made when the mind is to some extent enfeebled by sickness or old age. If one accepts these conclusions as sound it naturally follows that the proponent of the will should bear the burden of proving the sanity or testamentary capacity of the testator. This view of the law is well presented in *Crowninshield v. Crowninshield*, 2

Opinion of the Court.

Gray (Mass.) 524; *Delafield v. Parish*, 25 N. Y. 9, and *McMechen v. McMechen*, 17 W. Va. 683.

However, the more recent Massachusetts decisions do not adhere to the holding of *Crowninshield v. Crowninshield*, *supra*, that there is no presumption of sanity in the case of a testator, but do hold that the burden of proving sanity is on the proponent of the will notwithstanding such presumption and that the presumption of sanity will merely assist the proponent in sustaining this burden. *Fulton v. Umbehend*, 182 Mass. 487.

The first, and we might say the controlling, principle influencing the decisions of those courts which maintain that the burden of proving lack of sanity or testamentary capacity is upon the contestant is that the presumption of law is in favor of testamentary capacity and that he who insists on the contrary has the burden of proving it except where insanity in the testator has been shown to exist at a time previous to the execution of the will, especially if he has been adjudged insane, in which event the party offering the will is bound to prove that it was executed at a lucid interval.

We do not think that the trend of modern decisions favors the archaic idea that the heirs at law have a superior right in the estate of the testator or that wills are usually executed by persons *in extremis* or by persons whose minds have become impaired by sickness or old age. But even if this were true such facts are not now and never were in many jurisdictions regarded as necessarily showing a lack of testamentary capacity as is held in the early case of *Whitenack v. Stryker*, 2 N. J. Eq. 8.

There can be no question that at common law the legal presumption is that every man is of sound mind and the burden of proving that he is not rests upon the party asserting the existence of such an unnatural con-

Opinion of the Court.

dition of the mind of a person whose act or condition is questioned.

The presumption that every one is *compos mentis*, in the absence of proof to the contrary, must be held to prevail in this Territory unless it is manifest from statutory enactment that a different rule has been prescribed when the question of the exercise of testamentary capacity is involved. The contestants contend that our statute which provides that "Every person * * * of sound mind may dispose of his or her estate by will" (Sec. 3258 R. L. 1915) does away with the legal presumption of sanity in testators. Most of the courts rejecting the presumption of sanity have done so because of the peculiarity of their statutory provisions, as, for instance, in Minnesota where the statute in prescribing what proof shall be required when a will is offered for probate prescribes that at least one subscribing witness must testify to the execution of the will and the sanity of the testator and further provides that no will shall be effectual in the probate court nor in the district court upon appeal unless proved and allowed in the exact manner prescribed. *Layman's Will*, 40 Minn. 371.

Our statute contains no such provisions as those which influenced the Minnesota courts to hold that the common law presumption of sanity does not now prevail in that State. We do not think that our statute above quoted does more than declare what the law would have been had the statute been silent upon the subject of sanity. There being nothing in our statute which requires a different holding we think that in accordance with the better reasoning and the great weight of authority a testator, like other persons, must be presumed to have been sane at the time of the execution of his will until the contrary is shown except where it has been made to appear that prior to the time of the execution

Opinion of the Court.

of his will the testator was insane, in which event the proponent of the will must show that it was executed at a lucid interval. *McBride v. Sullivan*, 155 Ala. 166, 45 So. 902; *Barnwall v. Murrell*, 108 Ala. 366, 18 So. 831; *McDaniel v. Crosby*, 19 Ark. 533; *In re Dolbeer*, 149 Cal. 227; *Estate of Motz*, 136 Cal. 558; *In re Shapter*, 35 Colo. 578, 117 Am. St. Rep. 216; *Steele v. Helm*, 2 Marv. (Del.) 237, 43 Atl. 153; *Steinkuehler v. Wempner*, 169 Ind. 154; *Young v. Miller*, 145 Ind. 652; *Gates v. Cole*, 137 Ia. 613; *Hull v. Hull*, 117 Ia. 738; *Stephenson v. Stephenson*, 62 Ia. 163; *Woodford v. Buckner*, 111 Ky. 241; *Johnson v. Johnson*, 105 Md. 81; *Mullins v. Cottrell*, 41 Miss. 291; *Perkins v. Perkins*, 39 N. H. 163; *Lee's Will*, 46 N. J. Eq. 193, 18 Atl. 525; *In re Burns' Will*, 121 N. C. 336; *Grubbs v. McDonald*, 91 Pa. 236; *Hobby v. Bobs*, 12 Rich (S. C.) 248 note; *Bartu v. Thompson*, 67 Tenn. 506; *Leach v. Burr*, 188 U. S. 510.

Many of the courts on both sides of this question have held that the proper procedure is to require the proponent of the will in the first instance to make formal proof as to the execution of the will and the testamentary capacity of the testator, some holding that in the first instance the burden of proof is upon the proponent of the will to show its proper execution and the testamentary capacity of the testator but that when the proponent has made formal proof of these facts the burden of proof then shifts to the contestant who must establish the lack of sanity or testamentary capacity by a preponderance of the evidence. *Slaughter v. Heath*, 57 S. E. 69; *Wickes v. Walden*, 228 Ill. 56; *Craig v. Southard*, 162 Ill. 209; *Teckenbrook v. McLaughlin*, 209 Mo. 533; *McConnell v. Keir*, 76 Kans. 527; *In re Estate of Powers*, 79 Neb. 680; *Rathjens v. Merrill*, 38 Wash. 442. Others hold that from the first the burden of proof on the issue of testamentary capacity is on the contestant but that

Opinion of the Court.

this procedure is proper for the purpose of having the proponent make the necessary formal proof which he would be required to make in the absence of a contest before the will would be admitted to probate.

We have no objection to offer to this procedure, especially where the formal proof is required merely to have proof of due execution before the court as a basis for admitting the will to probate in the event of the failure of the contestant to establish any of his grounds of contest. This we think, however, is a matter that might well be left to the discretion of the trial judge who could then require the proponent to produce his formal proof either before the contestant opens his case or in connection with his proofs which would be offered to combat or rebut the case made by the contestant.

It is contended by the contestants that there has been no reversible error committed in this case for the reason that before either party had offered any evidence the proponent of the will asked for and procured from the trial judge an advance ruling upon the question of which party had the burden of proof upon the issue as framed and that in view of the conflict of authority on the question the court was at liberty to adopt either holding, and having held that the proponent had the burden of proving the sanity or testamentary capacity of the testator he now has no ground of complaint.

It is true that at the outset the court did hold that the proponent having the affirmative of all issues must prove them or lose the case. If this could be considered as a mere matter of procedure there might be some merit in the contention of the contestants, but it is manifest from an examination of the record that the court was not merely laying down a mode of procedure but was holding the burden of proof on all of these issues to be

Opinion of the Court.

upon proponent and the trial was conducted throughout upon that theory.

By his exception No. 1 the proponent has brought up for review this advance ruling of the trial judge. At the conclusion of the trial the court instructed the jury and proponent's exception No. 63 complains of the refusal to give his special instruction No. 4, which is as follows: "The court further instructs you that the law presumes, and it is your duty to presume, that every person who has arrived at the age of discretion is of sound mind and capable of disposing of his or her property by will or otherwise until the contrary is shown, and the court instructs you that it is your duty to hold that the said Kaahanui Lopez at the time she is alleged to have executed the will in question was of sound mind and to so hold until you believe by a preponderance of the evidence that she was otherwise." Said exception also complains of the court having given at the request of the contestants the following charge: "The burden is upon the proponent of the will of February 6, 1916, to prove the affirmative of each and every one of the issues of fact which are submitted to you for decision and he must prove such affirmative by a preponderance of the evidence. And if he fail to do so as to any of said issues then upon that issue your answer must be in the negative. If with reference to any one of the issues the evidence preponderates in favor of the contestants or is evenly balanced your answer to such issue must be in the negative. If upon any one of the issues the evidence is in such a state that you are unable to find with satisfaction to yourself what the answer should be then upon that issue your answer must be in the negative."

From this it will be seen that the question presented does not involve a mere matter of procedure. The instruction requested by the proponent and quoted above

Syllabus.

correctly stated the law and should have been given. The instruction requested by the contestants and given incorrectly stated the law and should have been refused.

This conclusion makes it unnecessary to consider any of the other exceptions.

Exceptions Nos. 1 and 63 are sustained.

C. F. Peterson (*E. K. Aiu* with him on the brief) for proponent.

A. Perry and *L. Andrews* (*Perry & Matthewman*, *N. W. Aluli*, *Andrews & Pittman*, *H. L. Grace* and *E. J. Botts* on the brief) for contestants.

C. Q. YEE HOP v. E. M. NAKUINA.

No. 1219.

RESERVED QUESTIONS FROM CIRCUIT COURT, FIRST CIRCUIT.
HON. J. T. DEBOLT, JUDGE.

ARGUED OCTOBER 31, 1919.

DECIDED NOVEMBER 7, 1919.

KEMP AND EDINGS, JJ., AND CIRCUIT JUDGE BANKS
IN PLACE OF COKE, C. J., ABSENT.

ABATEMENT AND REVIVAL—*grounds of abatement—another action pending.*

If a suit is commenced while a prior suit is pending in the same court for the same cause between the same parties the pendency of the prior suit is a good plea in abatement unless a dismissal, discontinuance or other termination of the first suit is had before the plea of the pendency of such suit is filed in the second suit.

DISMISSAL AND NONSUIT—*voluntary termination—necessity of leave of court.*

A formal order or judgment of the court is unnecessary to enable a plaintiff to discontinue his suit before trial but the consent of the court, either express or implied, is necessary.

Opinion of the Court.

OPINION OF THE COURT BY KEMP, J.

This cause is before us upon questions reserved by the second judge of the first circuit. The facts necessary to an understanding of the questions will first be given and are as follows: On the 12th day of May, 1919, plaintiff herein filed an action in the circuit court against the defendant upon a promissory note and caused an attachment to issue out of and under the seal of the circuit court against the property of the defendant; that thereafter the defendant moved to dissolve the said attachment on the ground that the bond given therefor was insufficient, and the motion coming on to be heard was granted by the court and the attachment dissolved; that thereafter the plaintiff attempted to discontinue said action without securing an order of court therefor and without notice to defendant or defendant's consent by filing a written statement in said cause reading as follows: "The above entitled action is hereby discontinued," signed by the plaintiff by his attorney; that immediately after filing said paper plaintiff filed a second action against the defendant upon a declaration identically the same as the declaration in the first action and for the same relief and caused an attachment to issue out of and under the seal of said circuit court attaching property of defendant; that thereafter the defendant moved to dissolve said attachment on the ground that the bond given therefor was insufficient and the motion coming on to be heard argument was had and the motion taken under consideration by the court; that thereafter and before the court had rendered its decision on said motion plaintiff attempted to discontinue said action without securing an order of court therefor and without notice to defendant or defendant's consent by filing a written statement in said cause substantially in the words used in his attempt

Opinion of the Court.

to discontinue the first cause and above quoted; that immediately thereafter plaintiff filed a third action against the defendant upon a declaration identically the same as the declaration in each of the other actions and for the same relief and caused a writ of attachment to issue out of and under the seal of said circuit court attaching property of the defendant; that thereafter the defendant moved to dissolve the said attachment on the ground that the justification of the sureties on the attachment bond was insufficient and the motion coming on to be heard argument was had and the motion taken under consideration by the court; that thereafter and before the court had rendered its decision on said motion, plaintiff attempted to discontinue said action without securing an order therefor and without notice to defendant or defendant's consent by filing a written statement in said cause substantially in the words used as aforesaid in his attempt to discontinue the first and second actions; that immediately thereafter plaintiff filed a fourth action against the defendant upon a declaration substantially the same as the declaration in each of the other actions and for the same relief and caused a writ of attachment to issue out of and under the seal of said circuit court attaching property of the defendant; that thereafter the defendant herein filed a plea in abatement in the fourth action alleging in substance that there are other actions, three in number, pending between the same parties before this court on the same cause of action as herein sued upon and for the same relief; that the above entitled action is vexatious and not brought in good faith and in bringing the same plaintiff has abused the judicial process of the court.

The answer of the plaintiff to the above plea in abatement denies that there are other actions, three in number or any other number, pending between the same parties

Opinion of the Court.

before the same court on the same cause of action as herein sued upon and for the same relief, denies that the above entitled action is vexatious and not brought in good faith and denies that in bringing the same plaintiff has abused the judicial process of the court, and further alleges that the three successive actions above referred to as having been discontinued were, with the knowledge and without objection from the Honorable J. T. DeBolt, second judge of the first circuit court then and now presiding at term in the trial of civil actions, severally discontinued prior to the institution of said actions in chronological order and that none of said actions was pending at the time of the commencement of the above entitled action and that none of said actions is now pending in the above entitled court.

Upon the filing of said plea in abatement by defendant and the answer of the plaintiff thereto the Honorable J. T. DeBolt, circuit judge, before whom said action was pending, reserved for the consideration of this court three questions as follows: "(1) Should the plea in abatement be sustained? (2) Is this proceeding vexatious and does it represent an abuse of the process of the court? (3) Is an order of court necessary for a discontinuance of an action so that a second action may be filed by the plaintiff against the defendant upon the same cause of action and for the same relief?"

The plaintiff concedes that if any one of the first three of his suits against this defendant on the same cause of action is now pending the plea in abatement should be sustained. Some of the early common law authorities are to the effect that if a suit is commenced while a prior suit is pending for the same cause between the same parties the pendency of the prior suit is a good plea in abatement even though it has been dismissed or discontinued before the filing of the plea, and this doctrine has

Opinion of the Court.

been recognized in some of the earlier cases in this country. There is now, however, a very general concurrence of opinion that the dismissal, discontinuance or other termination of the first suit before the plea of the pendency of such suit is filed in the second suit, although after commencement of the second suit, defeats the plea. (1 C. J. p. 94.) We must therefore determine whether or not the action of the plaintiff in filing his written statement in each of his successive suits, as above indicated, constituted a discontinuance thereof.

Some of the cases hold that the plaintiff may dismiss without formal application or leave of court at any time before trial; others that such dismissal may be had in term time and not in vacation, but the general rule seems to be that a discontinuance must be by leave of court, express or implied, and that a dismissal cannot be accomplished by the mere act of the plaintiff alone. It is considered that the granting or refusal of leave to dismiss, discontinue or to take a nonsuit is a matter of practice resting in the discretion of the court, which discretion is to be exercised with reference to the rights of both parties. (14 Cyc. 395-6.) In the case of *Smith-Frazer Boot & Shoe Co. v. Derse*, reported in 41 Kans. 150, it is held that "An action may be dismissed by the plaintiff without prejudice to a future action at any time before the final submission of the case to the jury or the court; but as the dismissal is in the nature of a judgment it must necessarily require an order of the court and cannot be accomplished by a mere act of the plaintiff alone." In the case of *Veazie v. Wadleigh*, 36 U. S. 54, after a question had been certified from the U. S. circuit court for the district of Maine to the supreme court of the United States the plaintiff filed with the clerk of the circuit court a notice of discontinuance as follows: "I hereby notify you that the action of trespass which is now

Opinion of the Court.

pending in said court to await the decision of certain questions carried up to the supreme court is discontinued by me; and that the same disposition will be made of the case in the supreme court at Washington as soon as it meets at Washington. You will therefore please to file this in the case and notify the counsel of the defendants of the same and that their legal costs in the said circuit court may be immediately made up and the same will be paid." The supreme court of the United States in discussing the question of whether this constituted a discontinuance of the cause pending in the circuit court said: "The only point of difficulty is, whether the filing of the above paper in the circuit court in vacation constitutes, *per se*, a discontinuance of the original cause, without any action of the circuit court thereon, upon which this court ought now to act. According to the practice of some of the courts in the Union, it is understood to be the right of the plaintiff to enter a discontinuance of the cause at any time, either in term or in vacation, upon the payment of costs, before a verdict is given, without a formal assent of, or application to, the court; and that, thereupon the cause is deemed, in contemplation of law, to be discontinued. In Massachusetts and Maine a different practice is understood to prevail; and the discontinuance can only be in term, and is generally upon application to the court. In many cases, however, in these States, it is a matter of right. In *Haskell v. Whitney*, 12 Mass. 49-50, this doctrine was expressly recognized. The court on that occasion said, 'The plaintiff or defendant may, in various modes, become nonsuit, or discontinue his cause at his pleasure; at the beginning of every term at which he is demandable he may neglect or refuse to appear; if the pleadings are not closed, he may refuse to reply, or to join an issue tendered; or after issue joined he may decline to open his cause to the jury; the

Opinion of the Court.

court also may, upon sufficient cause shown, allow him to discontinue, even when it cannot be claimed as a right, or after the cause is opened and submitted to the jury.' Before the trial then the plaintiff may, in many cases, as a matter of right, discontinue his cause, according to the practice of the state courts, at any time when he is demandable in court. After a trial or verdict he can do so only by leave of the court, which it may grant or refuse in its discretion. But under ordinary circumstances, before verdict, it is almost a matter of course to grant it, upon payment of costs, when it is not strictly demandable of right." (p. 61.)

The court's conclusion was that under the circumstances of that case the plaintiff would be estopped thereafter to withdraw his assent to the discontinuance of his suit in the circuit court and that that court possessed full authority to enter such discontinuance at its next term upon the mere footing of the paper filed in the clerk's office without any further act of the plaintiff and that the original cause in the circuit court ought to be treated as virtually at an end for all the purposes of requiring a decision upon certified questions and that the motion to withdraw the record and discontinue the same ought to be granted. The question before the court in that case was a different question from the one before us but it will be seen that the action in that case was not treated as having been dismissed but that the plaintiff would be estopped from withdrawing his assent to a dismissal to be entered in the future.

In the case of *Gamsby v. Ray*, 52 N. H. 513, the plaintiff commenced a suit against the defendant by a writ dated July 25, 1872, which writ was duly served upon the defendant by attaching property and leaving a summons. On August 5 the plaintiff caused the following written notice to be served upon the defendant: "To Orman P.

Opinion of the Court.

Ray: You are hereby notified that the suit against you by Julia A. Gamsby commenced by writ dated July 25, 1872, is hereby discontinued, and you need not appear at the return day thereof," signed by the plaintiff by her attorney. After the service of this notice upon the defendant a new suit upon the same cause of action was commenced by the same plaintiff against the same defendant, the writs being substantially alike except in their dates. To this second writ the defendant pleaded in abatement that there was another action pending between the same parties for the same cause of action when the last suit was brought. The question was whether upon the foregoing facts this plea in abatement must be sustained or overruled. After concluding that if the first suit was pending when the second was commenced the plea in abatement should be sustained the court considered the question of whether the serving of the above notice upon the defendant constituted a dismissal and on this question said: "We see no reason for holding that a plaintiff may, before entry, discontinue his suit without the consent of the defendant and thus avoid a plea of a former action pending. The defendant may be oppressed by repeated attachments of his person or property and subjected to various inconveniences, expenses and damages by a second, third, fourth, fifth or fiftieth suit brought by the same plaintiff for one cause. Against such renewed attacks the defendant could not efficiently defend himself if the plaintiff were allowed to withdraw from each attack at his pleasure, without the defendant's consent, for the purpose of making another to be given up in like manner. To be sure the feigned attacks might give the defendant a right of action for abuse of process, but the policy of the law is to allow defendants to defend themselves against such vexation by plea in abatement."

Applying the principles announced in the authorities

Opinion of the Court.

cited to the case at bar we think it must be held that the action of the defendant in pleading to the attachment in the second and third suits filed by the plaintiff constituted an implied consent to the dismissals of the first and second suits as attempted by plaintiff and that the defendant is now estopped by reason of said implied consent from asserting that said first and second suits are now pending. We also think that it is unnecessary in order for the plaintiff to effectually dismiss his suit to procure a formal order or judgment of the court to that effect. That the consent of the court, either express or implied, must be procured we readily concede, and this we think the plaintiff did in regard to his dismissal of the first and second suits, it being our opinion that the action of the court in entertaining the pleas of the defendant in the second and third suits constituted an implied consent to the dismissal of the first and second suits. But none of these facts would apply to the attempted dismissal of the third suit, because immediately upon the filing of the fourth suit the defendant entered her plea in abatement and neither she nor the court has done anything which could be considered as consenting to the dismissal of the third suit.

There are other facts disclosed in this case which impel us to the conclusion that the plaintiff's attempt to dismiss the third suit has not been effectual. The costs of said action have not been paid nor provided for nor has the rule of the circuit court which requires that all papers filed after the initial pleading must be served upon the opposing party or his counsel been complied with, and neither of these matters has been waived or its omission consented to, either expressly or by implication, by the defendant.

The plaintiff insists that the informal procedure followed by him in his attempted dismissal of said suit is in

Syllabus.

conformity with the practice heretofore prevailing in this jurisdiction. However that may be, we do not think that such practice is proper and this court would not be justified in giving an erroneous practice approval merely because it has heretofore been indulged in.

We think that the third question should be answered in the negative, the first in the affirmative and that the second question does not require an answer. But in so holding we think it proper to add that while an order of court is not necessary for a discontinuance of an action so that a second action may be filed by the plaintiff against the defendant upon the same cause of action it is necessary that the consent of the court, either express or implied, be procured.

W. J. Robinson for plaintiff.

E. J. Botts and *L. Andrews* (*Andrews & Pittman* and *E. J. Botts* on the brief) for defendant.

LEWERS & COOKE, LIMITED. *v.* ARTHUR H. JONES, JULIETTE M. JONES AND D. F. TURIN.

No. 1221.

EXCEPTIONS FROM CIRCUIT COURT FIRST CIRCUIT.

HON. C. S. FRANKLIN, JUDGE.

ARGUED NOVEMBER 7, 1919.

DECIDED NOVEMBER 19, 1919.

KEMP AND EDINGS, JJ., AND CIRCUIT JUDGE DEBOLT IN PLACE OF COKE, C. J., ABSENT.

MECHANICS' LIENS—*demand—when demand must be made.*

In an action to enforce a lien for materials furnished and used in the construction of a building it must appear that demand upon

Opinion of the Court.

the owner for payment of the amount claimed under the lien was made after the lien attached and prior to the filing of suit.

SAME—attaches when.

Under section 2864 R. L. the mechanic's lien does not attach until a notice thereof is filed and a copy of the notice is served upon the owner of the property.

OPINION OF THE COURT BY KEMP, J.

This is a suit to enforce a materialman's lien against premises which at the inception of the building were owned by the defendant Arthur H. Jones but before the filing of the mechanic's lien were conveyed by the defendant Arthur H. Jones to the defendant Juliette M. Jones, his wife. Upon the trial thereof, the plaintiff having put in its case and rested, the defendants Arthur H. Jones and Juliette M. Jones moved for a nonsuit upon four grounds: (1) that no demand as required by law was made upon the defendants or any of them prior to the institution of this suit; (2) that no demand was made upon the defendants or any of them subsequent to the service of the notice of lien as required by law; (3) that this suit was filed prior to the service of notice of lien; (4) that fraud in the conveyance between the defendant Arthur H. Jones and the defendant Juliette M. Jones was not shown. The court overruled this motion as to grounds 1, 3 and 4 thereof but sustained the motion as to ground 2, namely, that no demand had been made upon the defendants subsequent to the service of notice of lien. The plaintiff brings exceptions.

The sole question presented is, Does the fact that the demand for payment was made prior to the service of the notice of lien defeat the action? Section 2863 R. L. 1915 provides that "Any person or association of persons furnishing labor or material to be used in the construction or repair of any building * * * shall have a lien

Opinion of the Court.

for the price agreed to be paid for such labor or material (if it shall not exceed the value thereof) upon such building * * * as well as upon the interest of the owner of such building * * * in the land upon which the same is situated." Section 2864 provides that "The lien provided for in section 2863 shall not attach unless a notice thereof shall be filed in writing in the office of the clerk of the circuit court where the property is situated and a copy of the notice be served upon the owner of the property."

The statutory provisions which we have quoted must be complied with in order to bring into existence a lien of the nature sought to be enforced in this suit. From the provisions of section 2864 it will be seen that the steps necessary to be taken in order to create the lien are two in number, as follows: (1) a notice of lien must be filed in the office of the clerk of the circuit court where the property is situated; (2) a copy of the notice of lien must be served upon the owner of the property. Until these two steps have been taken the lien does not exist. Section 2867 provides that "the liens hereby provided may after demand and refusal of the amount due, or upon neglect to pay the same upon demand, be enforced by proceedings in any court of competent jurisdiction by service of summons, as in other cases."

In this case the plaintiff's evidence shows that the notice of lien was filed on November 5, 1914, and that shortly thereafter on the same day a demand for payment in writing was made upon the defendants Arthur H. Jones and Juliette M. Jones; that the notice of lien was served upon said defendants some time during the afternoon of November 6, 1914, and the suit filed on the afternoon of the same day.

If the demand for payment of the amount due cannot be legally made until the lien has come into existence

Opinion of the Court.

it is clear that the demand made in this case was prematurely made and would not be in compliance with the statute. In *Lewers & Cooke v. Wong Wong*, 24 Haw. 39, 43, Chief Justice Robertson, speaking for the court, said: "The making of the demand required by section 2867 lies between those conditions which must be met in order to give rise to the lien and the proceedings for its enforcement." In *Lewers & Cooke v. Fernandez*, 23 Haw. 744, 746, Mr. Justice Quarles, speaking for the court, said: "After the notice of lien is filed and copy thereof served upon the owner demand upon the owner for the amount claimed under the lien is a condition precedent to bringing suit for its enforcement, and the fact of making such demand must be alleged and proven." The plaintiff contends that the language just quoted from these decisions is mere dicta and in this contention it is probably correct but the statements are so aptly worded and so clearly express the construction which we place upon our statute that we have no hesitancy in approving them as a correct statement of the law. We are unable to see how it can be held that a demand for payment of the amount due under a lien made before any obligation rests upon the owner upon whom the demand is made, that is, before the lien comes into existence, is a compliance with the statute.

The plaintiff has cited and relies upon section 2866 R. L. 1915 for its contention that a lien of this nature is brought into existence by the filing of the notice of lien regardless of the service of a copy of the notice upon the owner of the property. Said section provides that "the lien herein provided shall have force only from the date of filing. It shall have priority in the order of filing over other liens of any nature and shall be subject to any prior recorded lien or judgment." In further support of this contention it has cited *Lucas v.*

Opinion of the Court.

Redward, 9 Haw. 23, 25. That case was dealing with the question of priority between a materialman's lien and a judgment and in the discussion of that question the court said: "A statute creating a mechanic's lien is in derogation of the common law and must be strictly construed and all the provisions of the statute must be strictly complied with. * * * It seems to us that the statute must be construed as giving the right of lien upon the performance of certain conditions, and that it is essential that they be complied with before the lien given shall have any affect. A man may have a right of attachment against his debtor but the right does not attach unless the writ be duly issued and served in accordance with law. If it was as contended the man who furnished the foundation of the building would always have the prior right even if he was the last to file notice because he was the first to furnish material. It seems clear to us that under our statute the lien does not attach, i. e., does not exist unless the notice is filed. The lien shall have force only from the date of filing; it is called into existence by the filing of the notice; before this it had no force or effect and was not binding upon any one." The last sentence quoted, if taken literally, would support plaintiff's contention that the lien comes into existence by the mere filing of the notice, but, as has been stated, the court was dealing with a question of priority between a materialman's lien and a judgment lien and was construing section 2866 as applicable to the facts before it. This case is strong authority for the proposition that the statute giving rise to the lien must be strictly complied with before the lien given shall have any effect. As we have heretofore pointed out section 2864 contains the provisions which give rise to the lien, while section 2866 is dealing with another subject, namely, priority of liens, and has no

Syllabus.

bearing upon the question of when the lien comes into existence.

We think the exception should be overruled and it is so ordered.

L. J. Warren (*Smith, Warren & Whitney* on the brief) for plaintiff.

M. F. Prosser and *U. E. Wild* (*Frear, Prosser, Anderson & Marx* on the brief) for *Arthur H. Jones* and *Juliette M. Jones*.

TERRITORY v. JOHN MARKS AND SEBASTIAN
REINY.

No. 1166.

EXCEPTIONS FROM CIRCUIT COURT, FIRST CIRCUIT.

HON. W. H. HEEN, JUDGE.

ARGUED NOVEMBER 14, 1919.

DECIDED NOVEMBER 24, 1919.

KEMP, J., AND CIRCUIT JUDGES DEBOLT AND THOMPSON IN
PLACE OF COKE, C. J., AND EDINGS, J., ABSENT.

CRIMINAL LAW—*evidence—exhibits.*

In a trial of two defendants indicted jointly of the crime of larceny of one red colored steer it appeared in evidence that certain butchers' tools, some of which were identified as having recently been in possession of one of the defendants, were found in close proximity to where the steer was found tied; that both defendants were seen in close proximity to the tied steer prior to the finding of the tools; that a dog identified as belonging to one of the defendants was baying the steer when first seen and the next morning was lying on the bundle of tools. Held, that under these circumstances it was not error to admit the said tools as exhibits in the case.

Opinion of the Court.

TRIAL—*instructions.*

Where the court has given an instruction sufficiently covering the points covered by a requested instruction it is not error to refuse the same although in itself correct.

SAME—*same—larceny—ownership.*

Where an indictment for larceny alleges ownership of the steer alleged to have been stolen in A it is necessary to prove that fact as alleged to authorize a conviction and an instruction which authorizes a conviction without proof of ownership as alleged is error.

SAME—*same—same—felonious intent.*

Under our statute defining larceny the felonious taking required is a taking with the intent to deprive the owner of the thing taken and to appropriate it to the use of the one taking and an instruction which authorizes a conviction, if the taking was with the mere intent to deprive the owner of the possession of the thing and without any intention of appropriating it to the use of the one taking, is error.

OPINION OF THE COURT BY KEMP, J.

The defendants John Marks and Sebastian Reiny were indicted jointly for the offense of larceny in the first degree. The indictment charges that they "on the seventeenth day of March in the year of our Lord one thousand nine hundred and eighteen did unlawfully and feloniously steal, take and carry away a certain thing of marketable, saleable, assignable and available value, to wit, one red colored steer of the value of one hundred dollars (\$100) of the goods, chattels and property of the Oahu Railway & Land Company, Limited, a corporation, existing under and by virtue of the laws of the Territory of Hawaii, and did then and there and thereby commit the crime of larceny in the first degree." At the trial both defendants were convicted of larceny in the first degree and are here upon exceptions complaining of the admission of certain evidence, of certain instructions given to the jury by the court and of the overruling of their motion for a new trial.

Exceptions numbered 1, 2 and 3 complain of the admis-

Opinion of the Court.

sion in evidence of certain butchers' tools which were found by the police officer making the arrest and others under the following conditions, as shown by the evidence. By the evidence of at least two witnesses some of the tools which were admitted in evidence as exhibits were identified as the same tools which a short time prior to the time of their finding were in the possession of the defendant Marks. There was also evidence to the effect that on the afternoon of the day preceding the day on which the tools were found the defendant Marks was seen in the immediate vicinity of where the tools were found in a buggy in which a bulky bundle was observed covered over with a rain coat and that within a few minutes, not exceeding a half hour, after he was seen in that vicinity with the bundle in his buggy he was again seen in the same buggy with the bundle missing, only the rain coat remaining. It also appears that on the same afternoon the police officer who made the arrest, in company with other officers, saw the defendant Reiny in the same vicinity on horseback in close proximity to the red steer, the subject of the alleged larceny, said steer being tied with his head close up to a large kukui tree, and that at said time a dog, also identified by the evidence of some of the witnesses as belonging to the defendant Reiny, was baying the steer. It further appears that upon the following morning when the same police officer, in company with Mr. Louis D. Warren, the manager of the Honouliuli ranch, visited the place where the steer was found tied, they found the tools which have been admitted in evidence as exhibits in close proximity to the place where said steer was tied and that the same dog, observed on the afternoon of the previous day baying the steer, was lying upon the bundle of tools.

The particular objection of the defendants to the admission of these tools in evidence is that there was no evidence connecting the defendants or either of them with the

Opinion of the Court.

ownership or possession of said tools. With this contention we cannot agree. If the possession of the tools by the defendants or either of them were a material fact to be found by the jury the facts which we have related would be sufficient to require the submission of that issue to the jury for their determination and were certainly sufficient to authorize their reception as evidence in the case.

Exception number 4 complains of various instructions given in behalf of the prosecution and of the refusal of the court to give various instructions requested by the defendants. Those instructions which the court refused to give at the instance of the defendants consisted of instructions defining "reasonable doubt" and "circumstantial evidence." We shall not set out the instructions refused nor those given by the court. Some of the instructions requested and refused were correct but their substance had already been given by the court in other instructions given at the request of the prosecution or of the defendants. Where the court has already given an instruction sufficiently covering the points covered by a requested instruction it is not error to refuse the same.

Of the instructions given at the request of the prosecution number 9 is as follows: "I further instruct you, gentlemen of the jury, that if you believe beyond a reasonable doubt from the evidence in this case that these defendants either removed the red colored steer mentioned in the indictment in this case from the property of the owner thereof with the intent to deprive the owner of the possession thereof or that the said defendants tied up the said steer with the intention of depriving the owner of the possession thereof and that the said steer was of the value of more than \$50.00, then it is your duty to find these defendants guilty as charged." This instruction was excepted to by the defendants and the exception is included in their bill of exceptions. This is the last instruction given at the

Opinion of the Court.

request of the prosecution and is a summing up of what will be sufficient to authorize a conviction of the defendants. No other instruction given by the court summarizes what would be sufficient to authorize the conviction of the defendants except special instruction number 4, given at the request of the prosecution, and to which no exception was taken, said instruction number 4 being as follows: "I further charge you that the defendants in this case are charged with the larceny of one red colored steer of the value of one hundred dollars (\$100) and if you believe beyond a reasonable doubt that these defendants or either of them did unlawfully and feloniously steal, take and carry away a red colored steer of the value of more than one hundred dollars (\$100) you should find such defendant or defendants guilty as charged." If the instruction complained of authorizes a conviction of the defendants or either of them without the prosecution having proven every element of the offense as charged then it was error to give said instruction and the exception will have to be sustained.

Our statute defines larceny as follows: "Larceny or theft is the feloniously taking anything of marketable, saleable, assignable or available value belonging to or being the property of another." Sec. 3918 R. L. 1915. In 25 Cyc. at 10 larceny is defined as follows: "Larceny is the taking and carrying away of the mere personal goods of another with intent to steal the goods." Various other definitions of larceny are given in the foot-note to the above text taken from text books and decisions of the various States, some of which we give as follows: "The fraudulent taking and carrying away of a thing without claim of right with the intention of converting it to a use other than that of the owner." Wharton, Crim. L., Sec. 862. "The taking and removing by trespass of personal property which the trespasser knows to belong either generally

Opinion of the Court.

or specially to another with the felonious intent to deprive him of his ownership therein, and, perhaps it should be added, for the sake of some advantage to the trespasser." 2 Bishop, Crim. L. Sec. 758. "Knowingly taking and carrying away the goods of another without any claim or pretense of right, with intent wholly to deprive the owner of them, and to appropriate or convert them to his own use." *State v. South*, 28 N. J. L. 28, 29, 74 Am. Dec. 250; Archbold Crim. L. 119 (quoted in *State v. Chambers*, 22 W. Va. 779, 785, 46 Am. Rep. 550).

From our statute it will be seen that the terms "larceny" and "theft" are used synonymously. In 38 Cyc. 272 theft is variously defined as follows: "Taking property of another from the possession of the owner with intent to defraud; the felonious taking and carrying away of the personal property of another with the intent to convert it to the use of the taker without the consent of the owner; the fraudulent taking of property with intent to deprive the owner of the value of the same and to appropriate it to the use of the person taking it; the fraudulent taking of personal property from another with the intent to appropriate the same to the taker's own use." These various definitions are taken from decisions cited in the foot-note.

In considering the question of whether or not the instructions complained of authorized the jury to find the defendants guilty without first having determined all of the necessary facts against them we are confronted with the necessity of deciding whether or not the instruction required them to find that the red colored steer which the defendants are charged with having stolen was the property of the Oahu Railway & Land Company. The only language used in the instruction which could have that meaning is the following: "the red colored steer mentioned in the indictment in this case." Nowhere is the alleged owner mentioned in this instruction. It might be

' Opinion of the Court.

possible if this were the only instruction given summarizing the things necessary to be found in order to convict the defendants that this would be sufficient, but in special instruction number 4, given at the request of the prosecution, the jury were told that they should convict the defendants if they found that they did "unlawfully and feloniously take and carry away a red colored steer" without any language which could be construed as confining it to the red colored steer described in the indictment and owned by the Oahu Railway & Land Company, Limited. The indictment having alleged the ownership of the Oahu Railway & Land Company, Limited, it was necessary to prove this fact and the jury should have been so instructed.

This instruction we think is also subject to the further criticism that it does not properly inform the jury with what intent the defendants must have taken the steer in question in order for the taking to constitute larceny. It will be seen from a reference to our statute defining larceny that the taking required is the "feloniously taking." The felonious taking required, as shown by the many definitions which we have quoted, is a taking with the intent to deprive the owner of the thing stolen and to appropriate the same to the use of the one taking. This instruction authorized the jury to convict if they found that the property was taken with the intent to deprive the owner of the mere possession and without any intention of appropriating the same to the use of the taker. And it seems to us that the said instruction is subject to one further criticism and that is that the jury were authorized to convict the defendants without finding that they were the original takers of the steer in question or even assisted or countenanced or advised such taking. The language to which we refer is as follows: "or that the said defendants tied up the said steer with the intention of depriving the owner of the possession thereof and that said steer was of the value

Syllabus.

of more than \$50 it is your duty to find these defendants guilty as charged." We think this language last quoted authorized the jury to find the defendants guilty if they were found in possession of the stolen property even though neither of them was shown to have had any part in the taking of the steer in question. This court has held that the mere possession of stolen property does not constitute sufficient evidence upon which to convict the party found in possession of the stolen property of the crime of larceny. *Republic v. Pahu*, 10 Haw. 74.

We think therefore that exception number 4 should be sustained and it is so ordered.

C. M. Hite, Second Deputy City & County Attorney (*W. H. Heen*, City & County Attorney, with him on the brief) for the Territory.

W. T. Rawlins for defendants.

HATTIE K. CRAWFORD *v.* JENNIE STEWART.

No. 1192.

MRS. W. H. CRAWFORD *v.* MRS. VIOLET FEELEY.

No. 1193.

ERROR TO CIRCUIT COURT, FIRST CIRCUIT.

HON. C. S. FRANKLIN, JUDGE.

ARGUED NOVEMBER 13, 1919.

DECIDED NOVEMBER 24, 1919.

KEMP, J., AND CIRCUIT JUDGES DEBOLT AND BANKS
IN PLACE OF COKE, C. J., AND EDINGS, J., ABSENT.

MASTER AND SERVANT—*period of hiring.*

The mere fact that the rate of compensation is agreed upon be-

Opinion of the Court.

tween master and servant at a certain sum per month does not in the absence of other evidence fix the period of hiring at one month.

SAME—*indefinite hiring—terminable at will of either party.*

A contract of hiring which specifies no time which it is to run, there being no facts proven from which it can be inferred that any particular time was contemplated by the parties, is a hiring for an indefinite time and may be terminated at will by either party.

OPINION OF THE COURT BY KEMP, J.

(Circuit Judge DeBolt, dissenting.)

The two above entitled cases were tried together in the circuit court, the evidence offered being applicable to both cases. The plaintiff brought these suits originally in the district court of Honolulu to recover of each of the defendants the sum of ten dollars for services for the month of December, 1917, in hauling the defendants from Honolulu to the Waipahu school and return. Each defendant tendered five dollars into court and plead a prior tender of a like amount. The judgment of the district court was for the amount tendered. The plaintiff appealed to the circuit court and trial was there had jury waived and a like judgment rendered. The plaintiff is here upon writs of error and has assigned the following errors: (1) The court erred in holding and deciding that the contract sued upon by implication contained an understanding between the parties thereto that although a contract from month to month it was to be a contract for only approximately a half month during the month of December, 1917; (2) the court erred in entering judgment for the defendants as aforesaid, and (3) the court erred in denying the plaintiff's motion for a new trial duly made and heard in open court on June 17, A. D. 1919. The motions for new trial are not brought up and the assignments complaining of their denial cannot therefore be considered.

An examination of the evidence is necessary to a de-

Opinion of the Court.

termination of the questions presented by the other assignments of error. It appears from the evidence that the defendants were in 1917 school teachers residing in Honolulu and teaching in the Waipahu school; that shortly prior to the 1st day of November, 1917, the defendant Jennie Stewart and another teacher, Miss Ruth Mossman, by telephone engagement met the plaintiff, Mrs. Crawford, at the Palace of Sweets in Honolulu and entered into an agreement with her to carry them from Honolulu to Waipahu and return five days out of the week at the rate of ten dollars per month, no mention being made of the length of time the service was to be performed. This contract or agreement was made in behalf of five "girls or women" who were teachers of the Waipahu school, and in behalf of one who was teacher of the Pearl City school and who was to pay but eight dollars per month. Nowhere in the evidence does it appear that Miss Stewart and Miss Mossman, or either of them, were authorized to represent the other defendant, Mrs. Feeley, or that the terms of the contract or arrangement made by them with the plaintiff were approved by her or were ever communicated to her. It affirmatively appears that the plaintiff never spoke with Mrs. Feeley of the matter. It also appears that at the time Miss Stewart and Miss Mossman made the agreement with the plaintiff it was agreed that the plaintiff would have the agreement reduced to writing and presented to them for signatures; that the writing was never produced but that on several occasions some of the girls asked plaintiff about it and were told that it was not yet ready. It appears that the defendants in company with the other teachers were carried to and from school at Waipahu through the month of November 1917, for which they each at the end of said month paid the plaintiff the sum of ten dollars; that all of the said teachers continued to

Opinion of the Court.

be carried by the plaintiff up to and including the 14th day of December, 1917, when the Christmas holidays began; that some time between the 14th day of December, 1917, and January 1, 1918, each of the defendants tendered to the plaintiff the sum of five dollars for her services up to and including December 14, which was refused. It also affirmatively appears that at the time of making the agreement no mention was made of the Christmas holidays.

At the conclusion of the evidence the court said: "There is no question but that the contract was made between the two parties for passage five days out of the week at the rate of ten dollars a month. There is further no question about the fact that no mention was made whatever of any holiday, or the Christmas holidays particularly. So there being no dispute as to the facts it is simply a question of law as to the effect of such a contract and its binding force." Judgment was thereupon rendered that plaintiff have and recover from each defendant the sum of five dollars which said sum of money is deposited with and in the custody of the clerk of the circuit court and that the defendants and each of them have and recover from the plaintiff her costs herein.

The plaintiff contends that the contract entered into, as shown by the foregoing facts, was one for services to be rendered from month to month and that the service having commenced for the month of December the contract could not be terminated prior to the end of the month except by mutual consent of the parties. If plaintiff is correct in her contention that the contract was one for service to be rendered from month to month then she is correct in her further contention that the contract could not be terminated prior to the end of the month without her consent. On the other hand, if it was a

Opinion of the Court.

contract of employment for an indefinite period, it could be terminated at will by either party. In 26 Cyc. at 980, 981, the law on this subject is stated as follows: "A contract of service for a definite period terminates by its own terms at the end of such period, and where the hiring is by the day, or from month to month, either party has a right to terminate it at the end of any particular day or month, but a contract from month to month can be terminated only at the end of a month except by consent. * * * A contract of employment for an indefinite term may, in the United States, be terminated at the will of either party."

The fact upon which plaintiff relies as establishing her contention that the contract involved in these cases is a contract for services to be rendered from month to month is that the services were to be paid for at the rate of ten dollars per month, her contention being in effect that from this fact alone it will be inferred that the contract was for a month and having entered upon a second month the contract could not be terminated except at the end of the month without her consent.

This is a very important question in this case—in fact is decisive of the question involved—and we do not find that it has ever been decided in this jurisdiction. However, there are many American decisions on the question which we have examined as carefully as we are able to do and conclude that plaintiff's contention is not in accord with the weight of American authority.

In 26 Cyc. 974, the rule is thus stated: "In the United States a general or indefinite hiring is presumed to be a hiring at will, in the absence of evidence of custom, or of facts and circumstances showing a contrary intention on the part of the parties. While it is generally held that the fact that a hiring at so much per day, week, month, quarter, or year raises no presumption that the

Opinion of the Court.

hiring was for such a period, but only at the rate fixed for whatever time the party may serve, yet the rate and mode of payment are often determinative of the period of service, and in some cases it has been held that they do raise a presumption as to the period of service."

Wood, in his work on the Law of Master and Servant, Sec. 134, after stating the English rule to the effect that a general hiring or a hiring by the terms of which no time is fixed is a hiring for a year, and concluding that the rule of the English courts to this effect has no application to similar questions in our courts, says: "With us the rule is inflexible that a general or indefinite hiring is *prima facie* a hiring at will and if the servant seeks to make it out a yearly hiring the burden is upon him to establish it by proof. A hiring at so much a day, week, month or year, no time being specified, is an indefinite hiring and no presumption attaches that it was for a day even but only at the rate fixed for whatever time the party may serve. It is competent for either party to show what the mutual understanding of the parties was in reference to the matter but unless their understanding was mutual that the service was to extend for a certain fixed and definite period it is an indefinite hiring and is determinable at the will of either party, and in this respect there is no distinction between domestic and other servants. But when from the contract itself it is evident that it was the understanding of the parties that the time was to extend for a certain period, their understanding, fairly inferable from the contract, will control. * * * So where the contract is for work at so much a day for one month or any other period or at so much a month for six months, no time being fixed for payment, full performance is a condition precedent to a right thereto. But if there is any special custom applicable to the business by which payment becomes due

Opinion of the Court.

weekly, monthly or otherwise, the parties will be presumed to have contracted with reference thereto and payment must be made in accordance therewith, but such custom must be certain and well defined. But a contract to pay one eight hundred dollars a year for services is not a contract for a year but a contract to pay at the rate of eight hundred dollars a year for services actually rendered and is determinable at will by either party. Thus it will be seen that the fact that the compensation is measured at so much a day, month or year does not necessarily make such hiring a hiring for a day, month or year but that in all such cases the contract may be put an end to by either party at any time unless the time is fixed and a recovery had at the rate fixed for the services actually rendered."

In the case of *Howard v. E. Tenn. V. & G. Ry. Co.*, 91 Ala. 268 (8 So. 868), it was held that a contract whereby a person hired at a certain amount per month to travel and work for a railroad to induce capitalists to make investments along its line and to induce excursionists to travel over its road, not being for any definite period of time, is terminable at any time by either party.

In *Kansas Pacific Ry. Co. v. Roberson*, 3 Colo., 142, which was a suit by Roberson against the railway company to recover \$3000 alleged to be due him from the company as its agent on the Pacific Coast, the facts were that in the summer of 1870 one Moffat was in San Francisco and received a telegram from the president of the Kansas Pacific Railway Company asking him to look out for a suitable person for agent of the company. Moffat telegraphed back recommending Roberson. After Moffat returned to Denver he telegraphed Roberson at the instance of the officers of the company asking what salary he would require. Roberson replied \$3000 per annum. On the 20th of September, 1870, Roberson received

Opinion of the Court.

a telegram from the general superintendent of the company as follows: "Will engage you to commence October 1st; the general ticket agent, R. G. Grinnell, will send you instructions by that date." Roberson subsequently received instructions as to his duties and entered upon his employment October 1. In February, 1871, Roberson received a letter from the general ticket agent of the company stating that the company had concluded to discontinue the San Francisco office after March 1, 1871, and discharging him effective upon that date. It appeared that Roberson had received from the company \$1250 for five months' service and that after March 1, 1871, he had worked for other parties at a compensation of \$150 per month until October 1, 1871. It does not appear from the evidence that in Roberson's correspondence with any of the officers of the company any period of service was fixed. It was contended by Roberson that these facts show a yearly hiring. In discussing this question the court said: "If now we advert to the situation of the parties, which is also a circumstance to be considered where the intention is not clearly expressed, we find nothing to support the theory that the contract was to continue for a year. Appellant was about to open an office in a distant city for the purpose of selling tickets and securing traffic over its road, and whether it would be profitable to maintain the office could not then be known. An intention to keep the office open for a definite time was not expressed and it is not reasonable to suppose that appellant intended to do so if it should result in loss. * * * In all that took place between the parties and the circumstances under which they acted there is nothing to show a contract for a year unless it can be inferred from the answer of appellee to Moffat's telegram, and that, we think, cannot be done. * * * As to the English rule that a general hiring shall be taken

Opinion of the Court.

to be a hiring for a year (2 Chitty's Contracts, 841) we have not found any American case which recognizes it and we think it has not been adopted in this country."

In *Greer v. Arlington Mills Mfg. Co.*, 43 Atl. (Del.) 609, the plaintiff Greer alleged that he entered into a contract or agreement with the defendant company on March 17, 1886, under which he was to receive \$5000 a year for his services as manager of said company; that he did act as manager from March 17, 1886, up to about the last of the year 1896, at which time he was discharged by the defendant company without any sufficient cause and without any fault on his part. He contended that the general hiring in 1886 was a hiring for the period of one year, and having continued to render the same service after the first year it became a hiring from year to year. He insisted that having been discharged in December, 1896, when the year would not have expired until March 17, 1897, he was entitled to recover that proportion of the salary for a year which the time from the date of discharge until March 17, 1897, bears to the whole year. The answer of the defendant was that the hiring was for an indefinite period and it therefore had the right to terminate the employment at will. The court, after discussing and disapproving the English rule to the effect that where there is a general hiring and nothing is said as to its duration the contract is understood to be for a year, quoted with approval from Wood, Law of Master and Servant, the paragraph above quoted by us, and concluded that the hiring in that case was a general hiring and terminable at the will of either party.

Edwards v. Railroad Co. 121 N. C. 490, was an action for the recovery of an alleged balance of salary due the plaintiff as general storekeeper for the defendant. The contract of employment of the plaintiff by the defendant was contained in a letter dated July 10, 1894, addressed

Opinion of the Court.

to the plaintiff by the general manager of the railroad company, the material part of which is as follows: "I beg to advise that you have been appointed general storekeeper for the system to take effect July 15. Your salary will be eighteen hundred dollars a year." The court in construing this contract said: "The contract before us is not specific as to the *term* of service,—certainly not so expressed in the writing. The plaintiff does not so insist but says a reasonable construction thereof leads to the conclusion that the parties intended a one year term of service. We are not able to see that such was their intention. It seems reasonable that if they had so intended they would have expressed themselves in more definite and explicit terms on so important a feature of their agreement. Why they were not more definite we cannot tell. They may or may not have had reasons for leaving the writing as it is or they may not have called their minds to that feature of the contract. It does not seem unreasonable that the parties intended that the service should be performed for a price that should aggregate the gross sum annually leaving the parties to sever their relations at will for their own convenience. All business men know they can make legal contracts to suit themselves, also the importance of saying what they mean in business matters in plain and definite terms."

Evans v. Railroad Co., 24 Mo. App. 114, involved a claim on the part of the plaintiff that he had been employed for a month and that his employment was from month to month. The court in this case sets out the plaintiff's own evidence, which is in effect that the party representing the defendant company who employed him did not state that he was being employed for a day or for any length of time; "he did not say whether it was for a day or month or year or what time." He also testi-

Opinion of the Court.

fied that "when the contract was made he did not say from when it ran, from the first, may be, or from the tenth, or otherwise. I agreed to work my month out for \$115 a month." He further said: "There was never any distinct agreement between me and Mr. Harris as to the length of time I was to be employed nor as to when my employment began or when it ended." In response to a question by the court he said: "All the contract as made by Mr. Harris was \$115 a month. Didn't say when it started or when it was to end." After referring to decisions from other states to the effect that if the payment of a monthly or weekly wage is the only circumstance from which the contract is to be inferred it will be taken to be a hiring for a month or a week the court cited and followed other Missouri cases holding that an indefinite hiring at so much per day, per month or per year is a hiring at will and may be terminated by either party at any time.

We have quoted at length from the decisions on this question because of the importance of the question involved but it does not seem necessary to do more than cite other cases to the same effect without quoting therefrom. *Booth v. India Rubber Co.*, 36 Atl. 714; *Railroad Co. v. Offutt*, 36 S. W. 181; *DeBriar v. Minturn*, 1 Cal. 450; *Prentiss v. Ledyard*, 28 Wis. 131; *Copp v. Coal & Iron Co.*, 46 N. Y. S. 542; *Kirk v. Hartman & Co.*, 63 Pa. St. 97; *Finger v. Brewing Co.*, 13 Mo. App. 310; *Hancy v. Caldwell*, 35 Ark. 156, 168.

There have been several American cases cited by the plaintiff which maintain a different principle from that so strongly affirmed and clearly recognized in the authorities above quoted and cited. They are to the effect that when a contract for services is made at so much per month without any agreement as to the duration of the service the intention of the parties to contract for

Opinion of the Court.

that period of time will be inferred. We have no doubt that the great preponderance of the best considered cases in this country recognize and affirm the rule laid down by Wood in his work on Master and Servant and which he terms the American rule, and we therefore hold that a hiring at a certain sum per month, no time being specified, unaccompanied by any facts or circumstances or any proof from which a different intention may be inferred, and when the testimony as to the contract is, as in this case, not conflicting, is an employment for an indefinite term and not for a month, and terminable at the will of either party. Such, according to the testimony of the plaintiff, was the contract with which we are now dealing. She testified that the contract was for ten dollars a month and made no mention of any period of time which the contract was to run. Other witnesses testified in the case and no attempt was made to prove any fact from which in our opinion the intention of the parties to contract for a definite period of time could be inferred.

Plaintiff's counsel in their able brief have cited two Hawaiian cases to the effect that contracts are to be interpreted according to the intention of the parties as they have expressed it and that words in a contract are to be construed in their plain and ordinary meaning, and where a meaning can be derived from them without the interpolation of other words this meaning must be received as the one intended by the parties. If the parties were desirous of making a contract for a definite period of time there was nothing to prevent them from including such term in their contract. They have failed to do this and we see no reason why we should ingraft upon the contract a term which the parties have failed to include in it. We think the more reasonable rule is the one which we have adopted, that is, where no term has been

Opinion of Circuit Judge DeBolt.

specified for the contract to run none will be inferred from the mere fact that payment is to be so much per month but will be a contract terminable at the will of either party. The amount tendered by the defendants to the plaintiff prior to the institution of the suit and again tendered in court was sufficient to meet the obligation resting upon them to pay for the services at the rate agreed upon.

We therefore hold that the court committed no error in rendering the judgments under consideration.

The judgments are affirmed.

J. W. Cathcart and *B. S. Ulrich* (*Thompson & Cathcart* on the brief) for plaintiff.

G. K. French for defendants.

DISSENTING OPINION OF CIRCUIT JUDGE DeBOLT.

I respectfully dissent from the majority opinion in this case.

The records before us show that the plaintiff and defendants, in the latter part of 1917, entered into an oral contract whereby they mutually agreed that the plaintiff should carry the defendants by automobile from Honolulu to Waipahu and back, five days in a week, Saturdays and Sundays excepted, for which services each defendant agreed to pay the plaintiff \$10 a month.

The services were rendered according to the contract for the month of November, 1917, and were paid for at the end of that month. From December 1, 1917, up to and including December 14, the plaintiff continued to carry the defendants as in November. But from and after December 14, without any notice whatsoever, the defendants failed to appear at the appointed time and place, although the plaintiff was on hand and ready each morning during the remainder of the month of December to carry them pursuant to the contract. There was

Opinion of Circuit Judge DeBolt.

no dismissal or discharge of the plaintiff, nor any notice that her services were no longer required.

Upon the facts thus disclosed by the records, the cases, as I view them, do not even come within the rule as laid down by the court in the majority opinion. While it is there held that the contract could be terminated at any time, the court does not hold, as I read the opinion, that the contract could be terminated without notice. Neither does the court cite in that opinion a single authority holding that a contract, such as the one under consideration, can be terminated without notice. And I venture to say that not a single authority to the contrary can be found. It is a fundamental and indispensable principle of Anglo-Saxon jurisprudence that no person can be legally affected in or deprived of his lawful rights without notice. *Nichols v. Coolahan*, 10 Met. (Mass.) 449, 450; 1 Labatt's Master & Servant (2d ed.) Sec. 213, p. 667; Id. Sec. 187, p. 583; Id. Sec. 233, p. 722 and n. 1; 13 C. J. 618; 26 Cyc. 980-987; *Harper v. Hassard*, 113 Mass. 187, 190.

In my opinion the mere silence of the defendants or their failure to appear at the appointed time and place to accept the services agreed to be rendered could not and did not operate *ipso facto* to terminate the contract in question. Is it possible that a party may, under the sanction and solemnity of the law, enter into a valid contract (though it be one for services to be rendered from month to month) and without even so much as the raising of a hand or the uttering of a single word cast off his contractual relations and step aside absolutely free from his solemn and theretofore legal obligations?

Upon the facts and circumstances disclosed by the records it is obvious, as I view the situation, that the parties, in the first instance, contracted for services to

Opinion of Circuit Judge DeBolt.

be rendered for the entire month of November. Having thus agreed upon the character of the services to be rendered and the time for which they were to be so rendered, as well as the amount of the payment therefor, the plaintiff entered upon the performance of the services thus contracted for and at the end of the month each defendant paid the plaintiff the agreed sum of \$10.

The circumstance of agreeing on weekly, monthly, quarterly, or half-yearly payments of wages is held in many jurisdictions to be sufficient of itself to create a presumption of a hiring for the period covered by each payment. This, in my opinion, is the better rule, and accords with reason and justice. Upon this question see *Labatt, supra*, Sec. 168; *Id.* Sec. 169, p. 539; *Kellogg v. Citizens' Ins. Co.*, 94 Wis. 554; *Smith v. Theobald*, 5 S. W. 394; *Magarahan v. Wright*, 10 S. E. 584; *Tatterson v. Suffolk Mfg. Co.*, 106 Mass. 56; *Cronemillar v. Duluth-Superior Milling Co.*, 134 Wis. 248; *Maynard v. Royal Worcester Corset Co.*, 200 Mass. 1.

And in all those jurisdictions where it is held that a hiring at so much per month or year, without more, is an indefinite hiring, this rule gives way where the surrounding facts and circumstances show a different intention of the parties. *Foltz v. Fuller*, 38 App. Cas. (D. C.) 139; *Weidman v. United Cigar Stores Co.*, 132 Am. St. Rep. 727.

As further and more clearly showing that the parties intended a hiring for an entire month, to be paid for by a gross sum, it will be observed that nothing was said as to payment from day to day, or from week to week, at the beginning of or during the month, but that upon the rendering of the full month's services they were then paid for. It seems perfectly clear that the parties considered the hiring for an entire month. The parties having, apparently, so intended and understood their contract to

Opinion of Circuit Judge DeBolt.

be a hiring for an entire month the court is bound by that intention. 13 C. J. 521.

It being apparent from all the surrounding facts and circumstances that the parties intended and contemplated the hiring in the first instance to be for the entire month of November, it, therefore, follows, that inasmuch as the parties continued their contractual relationship into the month of December precisely as it had theretofore existed, free from modification or break in its continuity, they must, necessarily, be understood as having contracted for such services for the entire month of December. Labatt, *supra*, Secs. 230, 231. The author (Sec. 231) says: "The presumption that, where the relationship of master and servant is continued after the expiration of the agreed term, the parties intend that the renewed engagement shall subsist for the same period as that covered by the original contract, is entertained not only in cases in which the duration of the first employment was fixed by an express stipulation, but also in cases in which that duration is itself a matter determinable with reference to a presumption of fact." In this connection see also *Zender v. Seliger-Toothill Co.*, 39 N. Y. S. 346; 26 Cyc. 976; 13 C. J. 626.

In 26 Cyc. 980, 981, it is said: "A contract of service for a definite period terminates by its own terms at the end of such period, and where the hiring is by the day, or from month to month, either party has a right to terminate it at the end of any particular day or month, but a contract from month to month can be terminated only at the end of a month except by consent."

In *Young v. Lewis*, 9 Tex. 73, the court said: "A hiring by the month at so much per month is a hiring from month to month, each party having a right to terminate it at the expiration of a month, but not after another month has commenced to run."

In *Jones v. Vestry of Trinity Parish*, 19 Fed. 59, 61,

Opinion of Circuit Judge DeBolt.

the court said: "There is a presumption of law that a person employed at a monthly salary is engaged by the month, so that either party may terminate the contract at the end of any month, unless it affirmatively appears that a definite period of employment was contemplated by the parties to the contract."

In *Tennessee Coal, Iron & Railroad Co. v. Pierce*, 81 Fed. 814, the court said: "A contract between a corporation and a workman who has received injuries while in its service, that he shall be paid a given rate of wages per month, and shall render such services as he can, without any stipulation as to the duration, is not an undertaking to pay such workman an annuity during the remainder of his life, but a contract of employment by the month, which may be terminated by either party at the end of any month."

The court in *Re Hudson*, 12 Fed. Cas. No. 6831, said: "A hiring at monthly wages imports that the engagement is by the month, terminable with each month, at the option of either party."

In *Dunbar v. Cuban Land & Steamship Co.*, 75 N. Y. S. 498, the court said: "Where a plaintiff is employed for an indefinite time at a fixed weekly sum, the contract may be determined by either party at the expiration of any week."

In *Beach v. Mullin*, 34 N. J. L. 343, 344, the court said: "The entirety of a contract does not depend upon its subject matter. An entire contract is a contract the consideration of which is entire on both sides. Whenever there is a contract to pay a gross sum for a certain definite consideration the contract is entire, and not apportionable either in law or in equity. Story on Contracts, §22. A contract to pay \$16 for a month's service is as entire in its consideration as is a contract to pay a certain sum for a single chattel, or for a specified

Opinion of Circuit Judge DeBolt.

number of chattels. The contract of hiring in this case was, that the plaintiff should work for the defendant for \$16 a month. Nothing further was said as to the term of service. The reservation of wages, payable monthly or weekly, will not control the contract so as to destroy its entirety, when the parties have expressly agreed for a specified term, as a year. But if the payment of monthly or weekly wages is the only circumstance from which the duration of the contract is to be inferred, it will be taken to be a hiring for a month or a week."

In the case at bar the parties did not only agree that the gross sum of \$10 was to be paid for an entire month's services, but in pursuance thereof each party proceeded to carry out the contract in its entirety and as a single and entire contract in all respects—both as to time and as to payment. The entire month's services were rendered and the gross sum of \$10 in full payment therefor was made at the end of the month, the parties thereby showing that they understood that the hiring was for a month. Thus, not only from the express terms of the contract itself, but also from the conduct of the parties in its performance, the hiring, obviously, was for an entire month for an entire sum. And it appears from the authorities that the courts are in substantial agreement in holding a hiring at a specified sum per month to import an engagement by the month. This accords with reason and common sense. When any person, layman or lawyer, speaks of a certain sum per day, or week, or month, he means just what he says, namely, a gross sum for an entire period of time.

Thus in *Moss v. Decatur Land Improvement and Furnace Company*, 30 Am. St. Rep. 55, a case almost identical in its facts with the case at bar, except that the plaintiff there was discharged, which is not the fact in the case at bar, the court said: "If one is employed to

Opinion of Circuit Judge DeBolt.

be paid by the month a designated price, this constitutes an entire contract by the month, which the employer cannot terminate at will, and under which he is liable for a month's wages if he discharges his employee without cause before the expiration of the month."

In *Dodson-Braun Mfg. Co. v. Dix*, 76 S. W. 451, is an instance of an oral contract for services to be rendered from month to month, in which the services had been commenced for a particular month, just as in the present case, the holding of the court being, in effect, that the contract could not be terminated until the end of the month in question. The court said in this connection: "The only contention of appellant is that the employment of appellee was for no particular length of time, and that therefore, it had the right to discharge him at any time without cause. The evidence relied upon to support this contention is the following testimony of appellee: 'At the time I was employed by Dodson-Braun Mfg. Co. I was not employed for any particular length of time, except from month to month, nor did I agree to work for any specific time, except from month to month. I did not designate to Mr. G. K. Lyon the period of time that I would work for the Dodson-Braun Mfg. Co., but Mr. Lyon and myself both agreed that the employment should be from month to month, at a salary of \$100.00 per month and expenses.' This undoubtedly shows an employment from month to month. When the hiring is from month to month each party has the right to terminate it at the end of the month; but after another month has begun to run, as is shown by the evidence in this case, neither can terminate it without consent of the other until the month then running has elapsed. *Young v. Lewis*, 9 Tex. 73; *Jones v. Vestry of Trinity Parish* (C. C.) 19 Fed. 59; Addison on Contracts, See 886."

Labatt, *supra*, at the end of Sec. 164, after an ex-

Opinion of Circuit Judge DeBolt.

tended discussion of the subject now under consideration, both in England and in the United States, and distinguishing between servants of a superior and those of an inferior grade, says: "For practical purposes indeed it may be said that a contract under which a servant is to be paid a certain rate of wages measured by the week, fortnight, or month, would almost invariably be understood as binding the master by implication to pay the wages at the end of each week, fortnight, or month."

The authority last cited, at Sec. 168, upon the question under consideration, also says: "The American decisions, so far as they go, betoken the adoption of a general rule to the effect that a stipulation for the payment of wages at certain regular intervals shorter than a year should, in the absence of countervailing evidence, be construed as importing that the duration of the contract is the length of the period between two of the payments."

In my opinion the facts disclosed by the records constitute a contract of hiring for the entire month of November for the gross sum of \$10, and, inasmuch as the services, identical in kind, were continued, without any break in continuity—without any change or modification—into the month of December, the presumption of fact, as well as of law, is, to my mind, conclusive that the parties intended the hiring to cover and include the entire month of December upon the same terms, and that the plaintiff was, accordingly, entitled to judgment for the sum of \$10 against each of the defendants.

Syllabus.

MRS. KANOHOHOOKAHI KALUHIWA *v.* MANUEL MIGUEL, ELI KAUKINI KAMEAHAIKU, KAWAHE, KAKA, MALIE, LUKA, ELENA, KEAE AND EMMA A. Y. ALULI.

No. 1211.

EXCEPTIONS FROM CIRCUIT COURT, FOURTH CIRCUIT.
HON. C. K. QUINN, JUDGE.

ARGUED NOVEMBER 24, 1919.

DECIDED NOVEMBER 28, 1919.

KEMP, J., AND CIRCUIT JUDGES FRANKLIN AND THOMPSON
IN PLACE OF COKE, C. J., AND EDINGS, J., ABSENT.

PLEADING—action to quiet title—cross complaint—sufficiency of.

In an action to quiet title under the statute even if the defendant may file a cross complaint against his codefendants which is doubtful a pleading of a defendant which sets up his title but fails to ask affirmative relief against his codefendants can not be regarded as a cross complaint.

EVIDENCE—stipulation—effect of stipulation.

When parties to an action stipulate certain facts to be true and further stipulate that certain witnesses if called would testify to other facts, both the facts stipulated to be true and the facts which it is stipulated the witnesses would testify to if called are before the court as evidence when the stipulation is filed.

DISMISSAL AND NONSUIT—action to quiet title—failure of plaintiff to prove title.

In an action to quiet title under the statute it is incumbent upon the plaintiff to prove a title in or to the land in dispute and if he fails to do so it will be unnecessary for the defendant to make any showing.

SAME—same—same.

The plaintiff having failed to prove the title in or to the land in dispute, there being nothing to authorize a litigation of the title between codefendants, the only judgment which the court was authorized to render was to nonsuit the plaintiff.

OPINION OF THE COURT BY KEMP, J.

This is a statutory action to quiet title to certain land

Opinion of the Court.

situated in the city of Hilo, Hawaii. The plaintiff Mrs. Kanohohookahi Kaluhiwa brought this action against the above named nine defendants. At the trial, before the plaintiff offered her evidence, the cause was dismissed as to the defendants Kaka and Keae and the trial proceeded against the remaining seven defendants. As part of the evidence to be considered in the case it was stipulated by all of the parties in part as follows: "(1) It is stipulated that the title to the property involved in this cause was vested in one Hoapili Kalahiki, who took from her father Kaukini, at the time of her death and that whatever title to the said property any of the parties hereto may have at present is derived from the said Hoapili Kalahiki." It was further stipulated by the parties "that if Joseph Kalana and John Kaimi shall be called as witnesses of this case on behalf of Emma Y. Aluli, they will each give as their evidence as follows: That Pakaikai (k) and Kakapulani (w) were married and had issue: Uaua (k), Kaukini (k), Luka (w), Waianuhe (k); that Uaua (k) married Kelikeia (w) but had no issue; that Kaukini (k) married Malia (w) and had as issue Hoapili (w); that Hoapili (w) married Sam Kalahiki (k) and had no issue and that Sam Kalahiki died before said Hoapili; that Luka (w) married Kaimi (k) and had as issue John Kaimi (k); that Waianuhe (k) married Miliana (w) and had issue, Waianuhe, Kamala and Luka, all of whom died intestate." The plaintiff also offered oral evidence which tended to prove that she was related to Hoapili Kalahiki through the maternal line of ancestors of the said Hoapili Kalahiki, that is, that she is the daughter of a brother to Hoapili Kalahiki's mother. The plaintiff further offered in evidence the deed, which was admitted over the objection of defendant Manuel Miguel, by which certain other persons who are admitted and shown by plaintiff's evi-

Opinion of the Court.

dence to have been related to Hoapili Kalahiki through the maternal line of ancestors conveyed their interest in the land to the plaintiff. The court having before it the evidence above outlined and the stipulation above referred to the plaintiff rested, whereupon the attorney for the defendant Aluli asked to be permitted to take the stand and put on her case and defendant Manuel Miguel moved the court at the same time to enter a non-suit upon the following grounds: "(1) That the plaintiff has failed to prove as alleged in her declaration, that she is the owner of the land therein described; (2) that the plaintiff has shown, if anything, that she is the descendant of the maternal line of ancestors of Hoapili Kalahiki who is admitted by stipulation to have been the owner of the land in question, while the evidence and stipulation show that the title in the land has descended through the paternal ancestors of Hoapili Kalahiki." The granting of the nonsuit was contested by the plaintiff and the defendant Aluli on the ground that there was sufficient evidence to decide who is the lawful owner of the property. The motion for nonsuit was overruled, to which ruling the defendant Miguel excepted. The court thereupon granted the request of the attorney for the defendant Aluli and permitted him to offer his evidence tending to establish title to the property in controversy in the defendant Aluli, which proceeding was objected to by the defendant Miguel on the ground that the plaintiff had shown no title in herself and that therefore the only judgment which the court would be authorized to enter would be to nonsuit the plaintiff. Numerous exceptions were taken by the defendant Miguel during the course of the further proceedings had in the cause, but if the conclusion is reached that the nonsuit should have been granted and the proceedings stopped at that point it will be unnecessary for us to consider any of the other exceptions.

Opinion of the Court.

At the close of the case as presented by the defendant Aluli and contested by the defendant Miguel the court entered the following judgment: "This action having been brought by the plaintiff alleging that she is the owner of that certain piece or parcel of land situated in the city of Hilo, County of Hawaii, Territory of Hawaii, as set forth and described in plaintiff's complaint, coming on to be heard before me on the 26th day of May, 1919, when all the parties above named appeared and were at issue to the court, jury being waived. The court having heard the parties, finds that the plaintiff takes nothing by her complaint and that the defendant Emma A. Y. Aluli is hereby adjudged and decreed to be the owner of the land described in the said complaint and entitled to the full and undisturbed possession of the same. Therefore it is adjudged that the defendant recover of the plaintiff her costs." The plaintiff having accepted the judgment of the court the case is before us upon exceptions of the defendant Miguel.

Section 3246 R. L. 1915, after providing in detail how estates shall descend in this Territory, contains the following language: "Provided, however, that if the estate come through either parent of the deceased intestate, the brothers and sisters of that parent and their respective heirs shall be preferred to those of the other parent."

It will be seen from an examination of the stipulation that facts were stipulated which show that this property would descend from the said Hoapili Kalahiki to those related to her through her paternal ancestor, if any such persons existed at the time of her death, and it was further stipulated that two witnesses would testify if called that there was a person in existence who is related to the said Hoapili Kalahiki through her paternal ancestor, viz., a son of her father's sister. It having been shown

Opinion of the Court.

by the plaintiff's oral testimony that she and those from whom she held the deed are related to the said Hoapili Kalahiki through her maternal ancestor it would follow that her evidence and said stipulation taken together showed a state of facts which would preclude any possibility of her having title.

The contention of the defendant Aluli that the facts disclosed by the stipulation were not before the court as evidence until proven by other evidence is without merit. The object of a stipulation such as the one in this case is to avoid the necessity of bringing other evidence to establish the facts stipulated as true and to avoid the necessity of calling certain witnesses who it is stipulated if called would testify to certain facts. Both the facts stipulated to be true and those which it is stipulated certain witnesses would swear to if called are fully before the court as evidence when the stipulation is filed.

"At the trial of an action to quiet title under the statute (R. L. Ch. 132) it is incumbent upon the plaintiff to prove a title in or to the land in dispute, and, if he fails to do so, it will be unnecessary for the defendant to make any showing." *Harrison v. Davis*, 22 Haw. 465, 466.

We have already seen that the plaintiff failed to show that she had any title in or to the land in dispute. From this it would follow that the nonsuit should have been granted and no further proceedings had in said cause unless in an action of this kind codefendants are entitled to litigate between themselves the question of which one has the title to the land in dispute, which is at least doubtful. *Harrison v. Davis, supra; Mercer v. Kirkpatrick*, 22 Haw. 644, 646.

In 18 C. J. 1175 it is held that where one of several defendants files a cross complaint asking relief against

Opinion of the Court.

plaintiff and other defendants the court cannot on nonsuiting the plaintiff dismiss the cross complaint. If then a defendant has the right in an action of this kind to file a cross complaint against other defendants and has actually done so in this case the nonsuiting of plaintiff would not dismiss the cross complaint.

In view of the conclusion which we have reached from an examination of the pleadings of the defendants in this case it will be unnecessary for us to decide whether or not a defendant in an action of this kind is entitled to file a cross complaint against other defendants. There is no contention that any of the defendants have so pleaded except the defendant Aluli who filed an answer containing in part the following allegations and prayer: "That she admits the allegations contained in paragraph numbered 2 of said complaint that she 'Emma Y. Aluli is in possession of said premises' and as to the allegation that the other named defendants are claiming said land this defendant (Emma Y. Aluli) leaves plaintiff to her proof thereof. Further answering defendant Emma Y. Aluli says that said plaintiff and said defendants Manuel Miguel, Eli Kaukini Kameahaiku, Kawahe, Kaka, Malie, Luka, Elena and Keae have no right, title or interest whatever in and to the land described in the complaint, but that she, this defendant (Emma Y. Aluli), is the sole owner of said land as trustee under and by virtue of that certain deed dated January 20, 1914, recorded in liber 390, pp. 488, in the territorial registry office, Honolulu, by one John Kaimi (and his wife) the sole heir at law of one Hoapili Kalahiki, the former owner of said land, a copy of which deed, marked exhibit 'A' is hereto attached and made a part hereof, and to which special reference is hereby made. Wherefore this defendant prays for judgment and for her costs herein and

Opinion of the Court.

for such other and further relief as to this court may seem just and proper.”

This pleading of the defendant Aluli does not, we think, constitute a cross complaint. She evidently did not so regard it for she styled it “Answer of Emma Y. Aluli.” In *White v. Reagan*, 32 Ark. 281, it is held that the only difference between a complaint and a cross complaint is that the first is filed by plaintiff and the second by defendant. Both contain a statement of facts and each demands affirmative relief upon the facts stated.

The answer of the defendant Aluli alleges that she is the owner of the land in controversy and alleges the facts which she relies upon to show that title. She nowhere asks in said answer for affirmative relief against her codefendants, her prayer being merely for judgment and costs “and for such other and further relief as to this court may seem just and proper.” There being no pleading which could be termed a cross complaint of the defendant Aluli against her codefendants is sufficient reason why no other judgment than a judgment of nonsuit against the plaintiff should have been entered in this case.

The defendant Miguel’s exception number 4 brought up to this court squarely raises the question which we have discussed. We think that said exception should be sustained and that the other exceptions brought up by said defendant need not be considered.

The exception discussed is sustained.

N. W. Aluli for defendant Aluli.

C. S. Carlsmith (*Carlsmith & Rolph* on the brief) for defendant Miguel.

VON HAMM-YOUNG v. HAW. GARAGE, 25 Haw. 253. 253

Syllabus.

**THE VON HAMM-YOUNG COMPANY, LIMITED, v.
THE HAWAII GARAGE, LIMITED.**

No. 1189.

EXCEPTIONS FROM CIRCUIT COURT, FOURTH CIRCUIT.

HON. C. K. QUINN, JUDGE.

SUBMITTED NOVEMBER 25, 1919.

DECIDED DECEMBER 11, 1919.

**KEMP, J., AND CIRCUIT JUDGES FRANKLIN AND BANKS IN
PLACE OF COKE, C. J., AND EDINGS, J., ABSENT.**

LANDLORD AND TENANT—*covenants—construction.*

Covenants in a lease of land, upon the breach of which a forfeiture is claimed, must be strictly construed.

SAME—*same—same.*

A lease provided that the acceptance of rent by the lessor should not be deemed to be a waiver by it of any breach by the lessee of any covenant therein contained. After a breach of covenants by the lessee known to the lessor the lessor accepted rent. Held that this provision of the lease prevented the acceptance of rent from being a waiver of the breach of covenant but did not prevent such acceptance from being a waiver of the right to declare a forfeiture for such breach.

SAME—*same—same.*

A lease provided that the lessee will permit the lessor at all seasonable times to enter the leased premises and examine the state of repair and condition thereof and will repair and make good all defects of which notice shall be given within thirty days after the giving of such notice. Held that in the absence of such notice and a failure for thirty days thereafter to make repairs and remedy defects in the condition of the premises no right to declare a forfeiture for violation of the covenants to make repairs and keep the premises in a sanitary condition had been shown.

TRIAL—*conduct of trial—view and inspection.*

In the trial of a case, jury waived, involving the question of whether or not a covenant to repair and keep in a sanitary condition had been violated it appeared that the premises at the time

Opinion of the Court.

of the trial were in practically the same state of repair and sanitary condition as they were when the forfeiture was declared, held not error for the trial judge to view and inspect the premises.

OPINION OF THE COURT BY KEMP, J.

On November 13, 1918, the plaintiff instituted summary proceedings in the district court of South Hilo, Hawaii, under chapter 154 R. L. 1915 for the possession of the premises involved in this cause, claiming a forfeiture by reason of the violation of certain covenants contained in the lease under which the defendant held possession of the said premises from the plaintiff. Upon a trial in the district court judgment was in favor of the defendant, from which the plaintiff prosecuted an appeal to the circuit court of the fourth judicial circuit. Trial was had in the circuit court, jury waived, where judgment was again had in favor of the defendant and plaintiff brings exceptions to this court. The lease in question was dated October 1, 1913, and provided for a term of five years but contained a clause of renewal for a like term upon the election of the lessee. The lessee had availed itself of this option and accordingly at the time of the declaration of forfeiture occupied the premises under a term which would not expire, unless forfeited, until October 1, 1923. Said lease contains among others the following covenants on the part of the lessee: "That it will also pay all taxes, rates, assessments, impositions, duties and other outgoings of every description to which the interest of the lessee in the premises hereby demised and or any interest therein hereby conveyed or any part thereof are now or may during said term or any extension thereof shall become liable, and whether the same are or shall be assessed to or be payable by law by either the lessor or lessee;" "That it will out of its own moneys during the whole of said term or

Opinion of the Court.

any extension thereof make, build and maintain all sewers, drains, roads and sidewalks required by law to be made, built, maintained and repaired upon or in connection with or for the use of the said premises or any part thereof and or any improvements thereon;" "That it will during said term or any extension thereof keep the said premises and all improvements thereon in a strictly, clean and sanitary condition, and observe and perform all the rules and regulations of the health authorities for the time being applicable to the said premises, and shall indemnify the lessor and its respective estates and effects against all actions, suits, damages and claims by whomsoever brought or made by reason of the non-performance or non-observance of the said rules and regulations and or of this covenant;" "That it will not suffer or make any alteration of the premises hereby demised or any improvements hereafter to be built thereon or connected therewith or any part thereof without the previous written consent of the lessor;" "That it will permit the lessor or its agent at all seasonable times during the term hereby demised or any extension thereof to enter the said premises and all improvements thereon and examine the state of repair and condition thereof, and will repair and make good all defects of which notice shall be given by the lessor within thirty (30) days after the giving of such notice." Said lease also contains the following general provisions: "Provided, however, if the lessee shall fail to pay the said rent or any part thereof within thirty (30) days after the same becomes due, whether the same shall or shall not have been legally demanded, or shall fail to faithfully observe or perform any of the covenants herein contained and on the part of the lessee to be observed and performed, or shall abandon the said premises, the lessor may at once reenter said demised premises and at its option terminate this lease without service of

Opinion of the Court.

notice or legal process and without prejudice to any other remedy or right of action or arrears of rent or for any proceeding upon breach of contract. And it is hereby expressly agreed and declared that the acceptance of rent by the lessor shall not be deemed to be a waiver by it of any breach by the lessee of any covenant herein contained."

As one of the grounds for forfeiture the lessor relied upon the failure of the lessee to repair the sidewalk in front of the demised premises. The evidence shows, and the court found, that the sidewalk in question was constructed of concrete and that one of the divisions 3x4 feet was cracked and depressed. The covenant of which it was claimed this was a breach provides in effect that the lessee will out of its own moneys during the whole of said term or any extension thereof, make, build and maintain all sidewalks required by law to be made, built, maintained and repaired upon or in connection with the said premises. The default of the lessee, to be a ground for forfeiture, must come strictly within the covenant. The covenant requires, as we have just shown, the lessee to make such repairs as are required by law and in the absence of a showing that the repair of said sidewalk was required by law no breach of this covenant has been shown.

Another ground of forfeiture relied upon was the alleged failure of the lessee to properly maintain the sewer which served the demised premises. In its brief the lessor has not discussed this ground of forfeiture other than to list it among the breaches of covenant relied upon. Under these circumstances we might well consider this ground of forfeiture waived. But the evidence upon this point as disclosed by the record is so overwhelmingly to the effect that the lessee did all that could be required of it in the care of the sewer that we fail to find any

Opinion of the Court.

ground for forfeiture for failure to properly maintain the sewer.

At the trial the lessor asserted as a ground of forfeiture the fact that the lessee had erected upon and under the sidewalk in front of the demised premises a gasoline pump and tank. There is no question of fact involved in this point it being admitted that the lessee did erect a gasoline pump upon the sidewalk, connected with a tank situated beneath the sidewalk. It is not quite clear which covenant in the lease it was claimed that this was a violation of but we assume that it was contended that it violated the covenant against the making of any alteration of the premises without the previous written consent of the lessor. This ground, like the one just discussed, has been ignored by the lessor in its brief and we could with propriety by reason of this fact treat it also as waived, but we think the undisputed facts fail to bring it within any covenant of the lease. The improvement was not upon the demised premises. The pump was situated upon the sidewalk and the tank beneath the sidewalk. If any one has a right to complain of the erection of this pump it would be the authorities having control of sidewalks and not the lessor.

The lessor also relies upon an alleged breach of the covenant by which the lessee agreed to keep said premises in a strictly clean and sanitary condition and to observe and perform all the rules and regulations of the health authorities for the time being. The court found as a fact that there had been no violation of this covenant. In this we think it was amply justified by the evidence and its finding in that regard will not be inquired into by this court.

There is a further clause in said lease, which we have quoted, which we think has a decided bearing upon these claims of the lessor and that is the clause whereby the

Opinion of the Court.

lessee covenants that it will permit the lessor at all reasonable times to enter said premises and examine the state of repair and condition thereof and will make good all defects of which notice shall be given by the lessor within thirty days after the giving of such notice. There is a complete failure upon the part of the lessor to show that any notice was given to repair the sidewalk or sewer or to remedy any condition which it deemed to be a violation of the covenant to keep the premises in strictly clean and sanitary condition or to remove the gasoline pump and tank. In the absence of such notice and a failure for thirty days thereafter to remedy such condition or repair such defect the lessor has failed to show a ground for forfeiture for a breach of covenants. This provision of the lease would of course apply only to those covenants on the part of the lessee relating to the state of repair and condition in which the premises were to be kept. It is so limited by its own terms and would not therefore apply to the remaining grounds of forfeiture relied upon.

Another ground of forfeiture which was relied upon by the lessor, and which it insists upon in its brief was the removal by the lessee of a platform or balcony which it erected inside of the building upon the demised premises shortly after it took possession thereof under the lease. The evidence shows that this balcony was fourteen feet wide by forty feet long extending across one end of the building; that it was erected upon and supported by its own uprights and was not in any manner attached to the building; that it was approached by a flight of stairs and was for the accommodation of the lessee's office force and of bins of various sizes in which were kept small automobile parts. It is also shown by the evidence, which is undisputed, that some five or six months prior to the institution of this suit the lessee removed said bal-

Opinion of the Court.

cony from the demised premises. The trial judge in his written decision disposed of this claim of forfeiture against lessor upon two grounds, (1) that the lessor had by its conduct waived the breach, if there was any breach, of the covenant, and (2) that the balcony did not constitute an improvement of the premises; that its removal did not constitute an alteration of improvements and therefore was no breach of covenant. Without regard to whether the trial judge was justified by the evidence in deciding this matter against the lessor upon the first ground we think there can be no question but that he was correct in his conclusion that the balcony did not constitute an improvement to the premises and that its removal therefore did not constitute a breach of the covenant.

One of the breaches of covenant, and we might say the principal one, relied upon by the lessor as a ground for forfeiture is the failure of the lessee to pay the taxes upon said premises. There is no contention that the lessee has in fact paid any of the taxes assessed against the property. On the contrary it freely admits that it has not paid them or any part thereof. The facts in connection with the return, assessment and payment of taxes, are in substance as follows: The lease in question, it will be recalled, is dated October 1, 1913; beginning with the year 1913 and including the year 1918 the lessor returned the demised premises together with other property owned or controlled by it for taxes; the property in question was only a portion of the premises held by the lessor under a lease from F. S. Lyman; the taxes upon the entire property leased by the lessor from Mr. Lyman were assessed each year to the lessor by reason of the fact that it made the tax return each year in its own name; the lessor having returned the property held by the lessee under the lease in question each year during

Opinion of the Court.

the existence of said lease as a part of the property held by it under the Lyman lease paid the taxes upon this entire property each year prior to the date upon which the same would become delinquent and never made an apportionment of the amount thus paid by it as between it and the lessor nor did the lessor ever demand of the lessee that it be reimbursed for the amount of taxes thus paid by it in behalf of the lessee. The lessee seeks to excuse this failure to pay the taxes on the demised premises upon several grounds which may be stated as follows: (1) that the lessor having voluntarily returned the property for taxation and having voluntarily paid the taxes assessed upon said return the failure of the lessee to reimburse the lessor for the taxes thus paid does not constitute a breach of the covenant to pay taxes; (2) that if it should be held that a failure to reimburse the lessor for the taxes thus paid would constitute a breach of the covenant to pay taxes then a demand upon lessee by the lessor is a prerequisite to its right to declare a forfeiture for such breach, and (3) that if neither of the two above contentions is sustained the lessor has by its conduct and the acceptance of rent after the breach waived its right to declare a forfeiture. In support of the first contention the lessee has cited *Byrane v. Rogers*, 8 Minn. 247, 251, where the court said: "Should the landlord pay the tax and then demand of the tenant its reimbursement to him, a refusal on the part of the tenant would give the landlord no right of reentry because such refusal would be no violation of covenant to pay the tax, and covenants, upon the breach of which forfeitures are claimed, must be strictly construed. A covenant to pay a tax, and a covenant to reimburse another who has paid it would be very different both in terms and effect." The doctrine to the effect that covenants, the violation of which gives the right of reentry and forfeiture, must be

Opinion of the Court.

strictly construed is well stated in the *Elevator Case*, 17 Fed. 200, as follows: "As a proposition pervading this doctrine of the right of reentry by the forfeiture of a lease of land, it is to be observed that the power to be exercised is a very strong power, and it is one which is exercised without the judgment of a court of justice or of anybody else but the party who is exercising it. The party determines for himself whether he has the right of reentry, without any resort to a court of justice. This is always a harsh power. It has always been considered that it was necessary to restrain it to the most technical limits of the terms and conditions upon which the right is to be exercised. Hence it is that the old common law provided in this class of contracts that it was the duty of the court to see that no injustice was done. It is reasonable, it is natural, that when a contract puts into the power of one man to say that under certain contingencies, of which he is to be the judge, he shall enter upon the house or home or property of another, and eject him instantly, and take possession,—it is reasonable, it is proper, that the contract and the acts which justify such a course of conduct should be construed rigidly against the exercise of the right." We must then look to the covenant to see whether or not there is anything contained therein of which the failure of the lessee to pay the taxes under the circumstances of this case constituted a breach.

The covenant obligated the lessee to pay all taxes to which the interest of the lessee in the demised premises is now or during said term or any extension thereof shall become liable and whether the same is or shall be assessed to or be payable by law by either the lessor or the lessee. We think that this covenant placed upon the lessee the obligation to pay the taxes even though they were assessed to and payable by law by the lessor. It

Opinion of the Court.

does not appear that the lessee made any objection to the lessor returning the property as it did for taxes. The lessee could have made a separate return of the property for taxes and thereby enabled it to make the payment itself. Its failure to make such return cannot now be set up as an excuse for not making the payment.

Lessee's next excuse for not having paid the taxes is that under the circumstances of this case a demand by the lessor for reimbursement is a prerequisite to its right to declare a forfeiture. That a demand for the payment of taxes is not a prerequisite to the right to declare a forfeiture for their nonpayment has been held by this court in *Cornwell v. Colburn*, 15 Haw. 632, and *Kanakani v. De Fries*, 21 Haw. 123. The lessee admits that such holding is now the law of this jurisdiction but insists that since the lessor voluntarily paid the taxes the rule announced by these cases should not control in this case. As we have already said, the lessee could have made a separate return of the property for taxes and thereby put itself in position to comply with the covenant contained in the lease. This it failed to do and we cannot see how this fact would change the rule announced in the cases above cited. Our opinion is therefore that the failure of the lessee to pay the taxes upon the demised premises constituted a breach of the covenant contained in said lease obligating it to pay said taxes and would justify the lessor in declaring a forfeiture unless, as further contended by the lessee, the acceptance of rent after the breach and other conduct of the lessor waived its right to declare a forfeiture for such breach.

This brings us then to a discussion of the main question which has been presented by the parties in their briefs, namely, the question of whether or not the lessor waived its right to declare a forfeiture in this case. In

Opinion of the Court.

the discussion of this question we will also include another ground of forfeiture relied upon by the lessor, the facts of which are as follows: In December, 1915, the lessor leased to the lessee another tract of land adjoining the premises in question. Shortly thereafter, in the early part of 1916, the lessee erected a building upon the premises described in this second lease and within a few weeks thereafter connected the two buildings by cutting a door in the wall of the building situated upon the premises involved in this suit. The covenant in the lease of which it is claimed the cutting of this door constituted a breach provides in effect that the lessee will not suffer or make any alterations of the premises hereby demised or any improvements thereon without the previous written consent of the lessor. It is not contended that the lessee procured the written consent of the lessor before cutting this door in the wall of the building. It is the contention of the lessee that the lessor has waived its right to declare a forfeiture on that ground by reason of the same facts which it urges as a waiver of its right to declare a forfeiture for the nonpayment of taxes. The evidence as to whether or not the lessor knew that this door had been cut is conflicting. The lessor's manager, Mr. West, testified positively that he did not know of the cutting of said door until in October, 1918, while the lessee's manager, Mr. Forbes, testified that before the door was cut he, in company with Mr. Beers and Mr. Heen, called upon Mr. West and procured from him his oral consent to the cutting of said door. The trial judge in his written decision found the facts in accordance with the testimony of Mr. Forbes. If Mr. West gave his oral consent to the cutting of the door in 1916 and continued to do business next door to the premises in question from that time down to the time of the trial of this case, as the evidence shows he did, it is inconceivable that he did

Opinion of the Court.

not know of the fact that the door had been cut. We do not hold that the procuring of the oral consent to cut the door was a compliance with the terms of the lease which required the lessee to procure the written consent of the lessor before making any alterations. We think that the cutting of the door without procuring the written consent of the lessor constituted a breach of the covenant and would justify the lessor in declaring a forfeiture unless it has by the acceptance of the rent and its conduct otherwise waived its right to declare such forfeiture. The lessor insists that by reason of that provision in the lease to the effect that the acceptance of rent by the lessor shall not be deemed to be a waiver by it of any breach by the lessee of any covenant contained in said lease the acceptance of rent by the lessor cannot be considered in determining whether or not the lessor has waived its right to declare a forfeiture. It is clear that unless the clause just quoted prevents it, the acceptance of rent accruing after the breach of the covenant was known to the lessor constituted a waiver of its right to declare a forfeiture. The evidence shows that the last breach of the covenant to pay taxes occurred in May, 1918, and we have seen that the breach of covenant against making alterations in the improvements occurred during the year 1916 and said breaches were known to the lessor at the time they occurred. Notwithstanding this fact the lessor continued to accept rent from the lessee and recognize it as a tenant up to and including the month of October, 1918. Counsel for the lessee in their very able brief have drawn a distinction between the waiver of a breach of covenant and a waiver of the right to declare a forfeiture. In this connection it is pointed out that a breach and a forfeiture are by no means synonymous and that the former can exist without the latter. The lease in question gives the lessor the option of

Opinion of the Court.

declaring a forfeiture for a breach of covenant but does not compel it to declare such forfeiture and provides that an exercise by it of its option to declare a forfeiture shall not prejudice its right to any other remedy or action for breach of contract. In this connection the lessee contends that the clause in the lease providing that acceptance of rent shall not be deemed to be a waiver of the breach of any covenant therein contained must under the rule requiring a strict construction of such contracts be confined to its exact language and not extended to include a waiver of the right to declare a forfeiture. With this contention we agree and hold that the acceptance of rent after the breaches of the covenants for the payment of taxes and the making of alterations in improvements, while not constituting a waiver of the lessor's right of action for breach of contract, did waive its right to declare a forfeiture for the breach of covenants. The following authorities recognize the principle that the waiver of a breach of covenant does not imply a waiver of a forfeiture and that the waiver of a forfeiture does not imply a waiver of a breach of covenant. *Rouaine v. Simpson*, 84 N. Y. S. 875; *Conger v. Duryee*, 90 N. Y. 601; *Brooks v. Rodgers*, 12 So. (Ala.) 61.

During the course of the trial the trial judge viewed the premises in question, to which action the lessor excepted. The evidence adduced prior to the viewing of the premises by the judge was to the effect that the premises were at that time in about the same condition as they were at the time of the declaration of forfeiture. Under these circumstances we think it was entirely proper for the trial judge to view the premises. It is not an uncommon practice in this jurisdiction for juries to view premises involved in the matter on trial under similar circumstances and we can see no reason why in a jury waived case the trial judge should not be permitted under such circumstances to view the premises.

Opinion of the Court.

Exception was also taken to the admission in evidence of the summons and declaration in a prior action brought in the district court for summary possession of the premises in question in this suit. The object of the lessee in offering this evidence was to show that the lessor had undertaken to procure a forfeiture of the premises in question on certain grounds which did not include the nonpayment of taxes and that such a declaration constituted a waiver of its right to declare a forfeiture for the nonpayment of taxes. The evidence was admitted but the trial judge in his written decision held that this did not constitute a waiver by the lessor of its right to declare a forfeiture for the nonpayment of taxes. Under these circumstances we think it is immaterial whether the evidence was admissible or not. The court having refused to consider it as evidencing a waiver of the right to declare a forfeiture the lessor was not injured and no error was therefore committed.

The lessor also excepted to the admission in evidence of statements by the witness Forbes as to the location of the sewer serving the demised premises, it being the contention of the lessor that the testimony of said witness was based upon hearsay. The witness on direct examination having testified in detail as to the location of the sewer was asked upon his cross-examination as to where he got his information. His reply was that he got his information from the plans on file in the board of health office. Thereupon a motion was made to strike all of his testimony as to the location of the sewer. Before ruling upon this motion the trial judge asked the witness if he had ever seen the sewer being worked upon, to which he replied in the affirmative and the motion to strike was thereupon overruled. In this we find no error as it does not appear, as contended by the lessor, that the witness' information was obtained entirely from hearsay.

Syllabus.

Finding no merit in the exceptions the same are overruled.

Carlsmith & Rolph for plaintiff.

Russell & Patterson for defendant.

MRS. ANTONE MORANHO *v.* HENRY DE AGUIAR.

No. 1223.

ERROR TO CIRCUIT COURT THIRD CIRCUIT.

HON. J. W. THOMPSON, JUDGE.

ARGUED NOVEMBER 4, 1919.

DECIDED DECEMBER 15, 1919.

KEMP AND EDINGS, JJ., AND CIRCUIT JUDGE FRANKLIN
IN PLACE OF COKE, C. J., ABSENT.

DEEDS—*rules of construction—favoring validity.*

An instrument intended to operate as a deed should so operate if it is not legally impossible for it to do so.

TENANCY IN COMMON—*Hawaiian hui—shareholders are tenants in common.*

The members of a Hawaiian land *hui* are tenants in common of its lands in proportion to their respective ownership of shares.

OPINION OF THE COURT BY KEMP, J.

This case comes to this court upon writ of error to the circuit court of the third judicial circuit. The defendant below seeks to have reviewed the judgment of the circuit court in favor of the plaintiff in an ejectment case. The land in question is known as lot No. 11 of the *hui* land of Holualoa and is fully described in the complaint. The case was submitted in the circuit court by stipulation of

Opinion of the Court.

the parties upon an agreed statement of facts, the essential features of which are as follows: On June 16, 1911, plaintiff, being the owner of three shares in the hui land of Holualoa 1 and 2, sold one-half of one share to John R. Costa; on March 16, 1916, said Costa executed a deed to the defendant Henry de Aguiar conveying to him the one-half share which had been conveyed to him by the plaintiff; subsequent to the deed from plaintiff to Costa and prior to the deed from Costa to de Aguiar the hui lands of Holualoa were by decree of the circuit court of the first judicial circuit partitioned among the various holders of shares in said hui who had been made parties to said proceeding but neither the said Costa nor the said de Aguiar was made a party to said partition proceeding; by said partition decree the plaintiff Mrs. Antone Moranho was awarded three tracts of land representing three shares in said hui, one of said tracts being lot No. 11 involved in this suit; John R. Costa went into possession of lot No. 11 upon the date of his purchase of said one-half share from the plaintiff in June, 1911, and remained in possession thereof until the date of his deed to the defendant when the defendant went into possession of said lot and has ever since held possession thereof. The circuit judge held that a deed of a share in a hui conveyed no title to the land and that therefore the defendant Costa acquired no title in the land by the deed from plaintiff and could convey none by his deed to the defendant de Aguiar.

Counsel for the plaintiff admit that the circuit judge in this conclusion was partly in error, the extent of their admission being that the conveyance of a share in a hui conveys an interest in the land and that the deed from the plaintiff to Costa conveyed to him an undivided one-sixth of the plaintiff's interest in the hui lands, and that he thereby became a tenant in common with her and other members of the hui. The plaintiff's further contention in

Opinion of the Court.

this regard is that the hui of Holualoa went out of existence upon the date of the partition decree and that the plaintiff and Costa ceased to own undivided interests in the hui land and that the plaintiff became the owner in severalty of the three lots of land awarded to her, including the land in dispute. They admit, however, that unless Costa lost title to the land by failing to intervene in the partition suit he became a tenant in common with the plaintiff in the three lots set off to her in the proportion of one-sixth and five-sixths. We are aware of no rule of law by which one can be deprived of his title in land by a judgment rendered in a cause to which he was not a party and cannot therefore adopt the suggestion that Costa lost his title by failing to intervene in the partition proceeding. Having admitted this much they seek to sustain the decision of the circuit judge on the ground that the deed from Costa to de Aguiar was a nullity because on that date there was no hui of Holualoa in existence and that the deed purporting to convey a share in the hui, which was nonexistent on the date of the deed, would be entirely inoperative. It is elementary that an instrument intended to operate as a deed should so operate if it is not legally impossible for it to do so. This rule applies even though the instrument is indefinite and admits of two constructions and an interpretation which will give the deed force will be adopted in preference to one which will make it of no effect. Where the conveyance cannot operate in one form it will be held to operate in that form in which by law it will effectuate the intention of the parties. (18 C. J. 256.) The deed from Costa to de Aguiar purports to convey "all of a certain one-half share in the hui land of Holualoa in Holualoa, district of North Kona, County and Territory of Hawaii, said one-half share being the same sold to the said party of the first part by Mrs. Antonia I. Moranho by deed

Opinion of the Court.

dated June 16, 1911, and recorded in the Registry of Conveyances in Honolulu in Liber 442 at pages 272 and 273."

The deed in question has not been skilfully drawn but the only objection to it is the manner in which the property thereby conveyed is described. It purports to convey all of a certain one-half share in the hui land of Holualoa purchased from the plaintiff and refers to the deed from the plaintiff to the grantor in said deed. The intention of the parties to this deed as gathered from the instrument itself was undoubtedly to convey to the defendant such rights as the grantor therein had in the lands formerly held by the hui of Holualoa and this effect we think should be given to said deed. This being true the defendant de Aguiar became a tenant in common with the plaintiff to the same extent that his grantor Costa was a tenant in common. "Each tenant in common is equally entitled to the use, benefit, and possession of the common property, and may exercise acts of ownership in regard thereto, the limitation of his right being that he is bound to so exercise his rights in the property as not to interfere with the rights of his cotenant. It follows that a tenant in common of land has no right to use force and violence to exclude his cotenant from entry on the common property, even though such entry be with the purpose of doing an act that may be tortious; and neither an action at law nor in equity can ordinarily be maintained between cotenants for the exclusive possession of the common property or for the sole enjoyment of the profits thereof, even though the one in possession refuses to deliver sole possession to his cotenant, or defendant forcibly took it from plaintiff's possession; if a tenant in common desires to have sole and exclusive possession of his interest in the common property he can only seek his remedy in partition." 38 Cyc. 17-19.

The plaintiff's remedy in this case was not an action in

Syllabus.

ejectment but if she desires to obtain possession of her interest in the lands in question her remedy is by partition.

The defendant's assignments of error to the decision and judgment of the court are sustained and the judgment of the circuit court is reversed and the cause remanded.

I. M. Stainback (*W. H. Beers* with him on the brief) for plaintiff in error.

A. G. M. Robertson (*Robertson & Olson* on the brief) for defendant in error.

MRS. ANTONE MORANHO v. HENRY DE AGUIAR.

No. 1223.

ERROR TO CIRCUIT COURT THIRD CIRCUIT.

REHEARING.

HON. J. W. THOMPSON, JUDGE.

ARGUED JANUARY 9, 1920.

DECIDED JANUARY 16, 1920.

COKE, C. J., KEMP AND EDINGS, JJ.

EJECTMENT—*tenancy in common—judgment.*

The rule obtaining in this jurisdiction is that a plaintiff who has been ousted may in an action in ejectment have judgment to the extent of the title proved by him as against his cotenant in possession.

EQUITY—*partition—trial of title.*

Before a court of equity will assume jurisdiction in a suit for partition the legal title of the property must first be set at rest.

OPINION OF THE COURT BY COKE, C. J.

An opinion in the above entitled cause was handed down by this court on December 15, 1919 (*ante* p. 267), wherein

Opinion of the Court.

it is held *inter alia* that the plaintiff's remedy is by partition in equity and not by an action in ejectment. The judgment of the lower court in favor of plaintiff was reversed and the cause remanded. The plaintiff filed a petition for rehearing alleging that certain conclusions of this court are contrary to the settled law in this jurisdiction. The petition for rehearing was granted and the cause was reargued and is again before us for a review of our former opinion. A history of the cause, which it is unnecessary to repeat here, is to be found in the former opinion of this court. The facts as set forth and the conclusions of law contained in the fore part of the opinion are in accord with the record and sound principles of law. In the concluding paragraphs of the opinion, however, it is held that " 'if a tenant in common desires to have sole and exclusive possession of his interest in the common property he can only seek his remedy in partition.' 38 Cyc. 17-19," that "the plaintiff's remedy in this case was not an action in ejectment but if she desires to obtain possession of her interest in the lands in question her remedy is by partition," and that "the defendant's assignments of error to the decision and judgment of the court are sustained and the judgment of the circuit court is reversed and the cause remanded." This is in line with the common law rule which still prevails in some jurisdictions but constitutes a departure from the principles of law adopted in these islands many years ago and which have repeatedly had the sanction of this court. The rule obtaining in this jurisdiction is that a plaintiff who has been ousted may in an action in ejectment have judgment to the extent of the title proved by him as against his cotenant in possession. The answer filed by defendant herein constituted a confession of ouster (*Nahinai v. Lai*, 3 Haw. 317; *Kauhane v. Kalu*, 4 Haw. 144; *Ching On v. Amana*, 6 Haw. 625; *Kaehu v. Namealo-ha*, 20 Haw. 648, 653; *Newell on Ejectment* 133). Also

Opinion of the Court.

that before a court of equity will assume jurisdiction in a suit for partition the legal title of the property must first be set at rest (*Wailehua v. Lio*, 5 Haw. 519; *Peters v. Kaa-naana*, 10 Haw. 384, 386; *Kaneohe Rice Mill v. Holi*, 20 Haw. 609; *Brown v. Davis*, 21 Haw. 327, 329).

Applying these principles to the case at bar it follows that plaintiff is entitled to an undivided five-sixths interest in the property awarded to her in the partition proceedings referred to in our former opinion and the defendant is entitled to a one-sixth interest therein. Lot No. 11 being the only parcel involved in this action the plaintiff should have judgment against the defendant for an undivided five-sixths interest in said lot. The circuit court erroneously held that the defendant has no interest in the property and that plaintiff was entitled to the possession of the whole thereof.

For the reasons hereinabove assigned all that portion of the former opinion of this court hereinbefore quoted should be and the same is hereby rescinded, revoked and set aside and the judgment of the circuit court is reversed and the cause is remanded to the court below with instructions to enter judgment in favor of plaintiff and against defendant for an undivided five-sixths interest in the land involved in this controversy.

I. M. Stainback (*W. H. Beers* with him on the brief) for plaintiff in error.

A. G. M. Robertson (*Robertson & Olson* on the brief) for defendant in error.

Syllabus.

MARY SANDERSON *v.* THOMAS SANDERSON.

No. 1218.

APPEAL FROM CIRCUIT JUDGE FIRST CIRCUIT.

HON. W. H. HEEN, JUDGE.

ARGUED DECEMBER 29, 1919.

DECIDED JANUARY 19, 1920.

COKE, C. J., KEMP, J., AND CIRCUIT JUDGE QUINN
IN PLACE OF EDINGS, J., ABSENT.

DIVORCE—review of evidence on appeal.

In cases turning wholly or largely on the credibility of witnesses and the weight of evidence much weight will ordinarily be accorded the findings of the trial judge.

SAME—allowance of expense money to prosecute appeal.

Where an application is made to the trial court for an order allowing expense money to be incurred by the wife in order to prosecute an appeal to this court from a decree adverse to her there can be no reversal if the court below exercised its sound discretion in the premises, even granting that such an allowance is authorized under the provisions of section 2935 R. L. 1915.

OPINION OF THE COURT BY COKE, C. J.

The libellant-appellant, Mary Sanderson, instituted in the circuit court of the first circuit a proceeding for a divorce against her husband Thomas Sanderson, the libellee-appellee, specifying extreme cruelty as the ground for divorce. The appellee interposed an answer denying the allegation of extreme cruelty and at the same time filed a cross libel for divorce against appellant alleging extreme cruelty and adultery. At the conclusion of the trial the court below denied the prayer of appellant's libel and granted a divorce to appellee on the ground of extreme cruelty and awarded to him the custody of the five minor children of the parties. Following the entry of the decree of divorce appellant sought to have the court below award

Opinion of the Court.

to her suit money to prosecute her appeal from the decree below to this court. The application was denied and appellant seeks a reversal of the main decree as well as of the order of the lower court disallowing suit money.

Little need be said respecting that portion of the decree denying appellant's prayer for a divorce. The evidence taken in respect thereto is abundantly sufficient to sustain the conclusions of the court below. The trial court found that the appellant had been guilty of extreme cruelty as alleged in appellee's cross libel. This finding was based upon evidence which disclosed a course of cruel conduct on the part of appellant towards appellee which had caused him great worry and mental suffering and which in turn had seriously impaired his physical condition. It is clear, as was found by the circuit court, that the conduct of the appellant was most reprehensible. It was established by the evidence that she had clandestinely kept company with men other than her husband; that she had posed for a number of photographs in a lewd and suggestive attitude with a man by the name of Whitson—a person with whom she testified she was only slightly acquainted, and that while Whitson was confined in the military guardhouse at Fort Ruger she had carried on a secret correspondence with him. The photographs and letters having by chance fallen into the hands of the appellee he was caused extreme mental worry and his health was impaired to the extent that he was compelled to cease work and undergo a long period of medical treatment at a local hospital. Following his convalescence there appears to have been a reconciliation between the parties, and on the insistence of the wife the family moved from the home owned by the appellee at Puunui to a rented cottage on Beretania street. It soon became apparent to appellee that the upkeep of the new home imposed a financial burden too heavy for his meagre income to maintain. He constantly worried and brooded

Opinion of the Court.

over this new trouble and was made sick thereby, but it appears that his wife was entirely out of sympathy with him and when appellee signified his intention to remove the family back to their Puunui home the wife not only peremptorily refused to return but restrained him from moving the household furniture and immediately started divorce proceedings against him.

It is argued that the appellee condoned the prior offenses of the wife herein referred to. But even granting that there was a condonation we think there is sufficient in the record to indicate conduct toward the appellee on the part of the appellant subsequent to the condonation to constitute a revival of her former transgressions and for this reason we are unwilling to say that the circuit court erred in granting a divorce to the appellee and awarding to him the custody of the minor children. As was said in *de Coito v. de Coito*, 21 Haw. 339, "On an appeal from a decree in a divorce case the entire record is brought up and this court will draw its own conclusions as to the facts from a consideration of all the testimony. In cases turning wholly or largely on the credibility of witnesses and the weight of evidence much weight will ordinarily be accorded the findings of the trial judge." The parties and their witnesses appeared and testified before the trial judge and at the conclusion of the trial the result depended upon the credibility of the witnesses and the weight to be attached to their evidence. The record we think is sufficient to justify the conclusion reached by the trial judge.

It is urged by appellant that the trial court committed error in refusing to adjudge appellee guilty of contempt of court for refusing to comply with an order granting appellant temporary alimony. It appears that an order for alimony was entered during the early stages of the proceeding and that appellee had fully complied with the order up to the time of the entry of the decree granting him a di-

Opinion of the Court.

vorce. The trial court properly took the position that the decree of divorce had the effect of rescinding and annulling the order for temporary alimony.

It is further urged by appellant that the trial court erred in not granting appellant's motion for suit money to defray the expenses of this appeal. Counsel for appellant cites the opinion of this court in *Hart v. Hart*, 23 Haw. 639, as authority supporting this contention. The two cases are not parallel. It was merely held in *Hart v. Hart* that where in a divorce proceeding an award of alimony has been made to the wife the provisions of section 2935 R. L. 1915 are broad enough to include the allowance of expense money and attorney's fees incurred or to be incurred by the wife in resisting an application to revoke the allowance of alimony, and where, under such circumstances, an application is made for expenses and attorney's fees the court should exercise its sound discretion in the matter, which in the *Hart* case the court refused and failed to do. But even granting (but we do not decide the point) that the provisions of section 2935 R. L. 1915 are liberal enough to include the allowance of expense money to be incurred by a wife in prosecuting an appeal to this court from a decree of divorce adverse to her in the court below, yet if the court exercised its sound discretion in the premises there could be no reversal of its action unless it be made to appear that the court had abused its discretion. In the case at bar the court exercised its discretion and denied the application for suit money. There is no showing that there was an abuse of discretion on the part of the court.

The decree and order herein appealed from are sustained.

H. L. Grace for libellant.

W. T. Rawlins for libellee.

Syllabus.

IN RE TAXES ONOMEA SUGAR COMPANY.

No. 1230.

CROSS-APPEALS FROM TAX APPEAL COURT FOURTH CIRCUIT.

IN RE TAXES PAAUHAU SUGAR PLANTATION
COMPANY.IN RE TAXES HONOKAA SUGAR COMPANY,
LIMITED.

Nos. 1231 AND 1232.

APPEALS FROM TAX APPEAL COURT FOURTH CIRCUIT.

IN RE TAXES HUTCHINSON SUGAR PLANTATION
COMPANY.

No. 1235.

CROSS-APPEALS FROM TAX APPEAL COURT THIRD CIRCUIT.

SUBMITTED DECEMBER 26, 1919.

DECIDED JANUARY 23, 1920.

COKE, C. J., KEMP, J., AND CIRCUIT JUDGE FRANKLIN IN
PLACE OF EDINGS, J., ABSENT.TAXATION—*equalization of assessments.*

An assessment cannot be reduced on appeal merely because property in another division has been assessed lower in comparison—the assessor having acted in good faith and the assessment not being in fact an overvaluation of the property in question.

SAME—*full cash value.*

Full cash value of a piece of property is what it would sell for when sold in the manner such property is usually sold.

SAME—*same.*

If property is not salable its value is what it would sell for if salable.

RE TAXES ONOMEA SUGAR CO., 25 Haw. 278. 279

Opinion of the Court.

SAME—enterprise for profit—growing crops.

In estimating the value of growing crops of cane as personal property, which combined with other property constituted the basis of an enterprise for profit, it is proper to consider the quantity and price of the sugar which said crops are expected to yield.

SAME—same—same.

Under normal conditions when the price of sugar on January 1 might not be the price at which it would sell throughout the year it would be proper to consider the average price which could be expected over a period of years in estimating the value of the crop for that year, but where, as was the case on January 1, 1919, the price for that crop had been fixed, the fixed price should govern in making the estimate of the value of the crop as a separate item of property.

SAME—same—taxable assets—value.

The net value of a piece of property is to be ascertained by allowing a proper amount for depreciation from year to year so that when the property is worn out and discarded the depreciations allowed will equal the original cost. The net value thus ascertained represents the true value for the purpose of taxation.

SAME—weight of decision of tax appeal court.

A decision of the tax appeal court though not having the conclusiveness of a jury verdict should not be disturbed for light reasons.

OPINION OF THE COURT BY KEMP, J.

These several cases come before this court upon appeals from the judgments of the tax appeal courts. The Onomea, Paauhau and Honokaa cases were heard by the tax appeal court for the fourth judicial circuit and the Hutchinson case by the tax appeal court of the third judicial circuit. The taxpayer's valuation, the assessor's valuation and the tax appeal court's valuation in the several cases follow:

Onomea Sugar Company

Taxpayer's valuation	\$3,400,000
Assessor's valuation	4,250,000
Tax Appeal Court's valuation	4,045,117

Opinion of the Court.

Hutchinson Sugar Plantation Company

Taxpayer's valuation	\$1,460,000
Assessor's valuation	1,750,000
Tax Appeal Court's valuation	1,575,000

Paaauhau Sugar Plantation Company

Taxpayer's valuation	\$ 750,000
Assessor's valuation	1,250,000
Tax Appeal Court's valuation	1,250,000

Honokaa Sugar Company, Limited

Taxpayer's valuation	\$ 475,000
Assessor's valuation	700,000
Tax Appeal Court's valuation	700,000

In the Onomea Sugar Company and the Hutchinson Plantation Company cases both the taxpayers and the assessors have appealed. In the other cases only the taxpayers have appealed.

The statutory provisions which it will be necessary for us to consider in these cases are contained in sections 1240 and 1241 of the Revised Laws as amended by Act 222, S. L. 1917, and are as follows:

“Section 1240. Personal property defined. The term ‘personal property,’ for the purposes of this chapter, shall mean and include all household furniture and effects, jewelry, watches, goods, chattels, wares and merchandise, machinery, ships or vessels, whether at home or abroad, all moneys in hand, rights of piscary (leasehold and chattel interests in land and real property solely acquired prior to the passage of this Act), franchises, patents, contracts, growing crops and all animals not in this chapter specifically taxed.”

“Section 1241. Basis of value for taxation. All real and personal property and the interest of any person in any real or personal property shall be assessed separately as to each item thereof for its full cash value.

“Land shall be equally assessed, according to its value for use or occupancy; this value shall be determined in cities and towns wherever else practicable, by the Somer’s

Opinion of the Court.

system or other means of exact computation from central locations.

“Provided, however, that in all cases where real and personal property, or several classes or kinds or parcels of real or personal property respectively, are combined and made the basis of an enterprise for profit, the combined property forming such basis of such enterprise for profit, shall be assessed as a whole on its fair and reasonable aggregate value.

“In estimating the aggregate value of such enterprise for profit, there shall be taken into consideration the net profits made by the same, also the gross receipts and actual running expenses; and where it is a company being a corporation whose stock is quoted in the market, the market price thereof, as well as all other facts and considerations which reasonably and fairly bear upon such valuation.

“In ascertaining the aggregate value of the property constituting the basis of an enterprise for profit for the purpose indicated by this section, there shall first be included all property combined and forming the basis of such enterprise whether within the definition of real or personal property set forth in this chapter or not, and there then shall be deducted therefrom the value of shares in other Hawaiian corporations, held or owned by such enterprise, the value of all property on which specific taxes are levied and the value of all property that would not be taxable if not so combined and made the basis of an enterprise for profit.”

The assessment in each case is of an enterprise for profit and is to be governed by the rules laid down in the above statute for taxing an enterprise for profit as distinguished from the taxation of separate items of real and personal property.

The four cases were by agreement of the parties and with the consent of the court briefed and submitted together and will all be disposed of in one opinion.

At the outset the taxpayers in their brief assert the belief that these appeals constitute the most important tax

Opinion of the Court.

cases that have come before this court since the decision in the leading case on the subject of taxation of plantation property in 1897 and reported in 11 Haw. 235. They further state that one of the objects of these appeals is to obtain an authoritative ruling as to whether the principles which were exhaustively, yet concisely laid down in the leading case referred to, most of which have been reaffirmed in later decisions by this court, are to continue to control the assessment of sugar plantation properties. We fully appreciate the importance of the leading case above as a precedent in cases of this kind and have no intention of departing from the principles laid down therein. But counsel must be aware of the fact that this one case does not, and could not be expected to, announce the whole law upon the subject of taxation of an enterprise for profit. This court in many other well considered cases has announced other and additional rules not in conflict with, but more specific than, the general rules therein announced which we think to be of quite as much importance and entitled to the same consideration from us.

The first subject discussed by the taxpayers in their very exhaustive brief is that of equalization of assessments throughout the Territory. They point out that the evidence adduced in these cases before the tax appeal courts shows that this year's assessments on sugar plantations upon the basis of the capitalization of profits on the Island of Oahu are at the average rate of 22.65 per cent.; on the Islands of Maui and Kauai between 18 and 19 per cent., while on Hawaii the assessments are at the average rate of 16.38 per cent., in each case the figures being based on a four-year average of profits.

The taxpayers recognize the fact that plantations on the different islands and different plantations on the same island are, because of various circumstances affect-

Opinion of the Court.

ing their valuation, not to be valued solely by the method of capitalization of profits but that all the circumstances having a reasonable bearing upon their valuation are to be considered. It is also true, we think, that the method of comparison of assessments resorted to in this case is practically useless. In fact we doubt that such comparisons should be considered at all in cases such as these because all of the facts which would properly influence the various assessors in making their assessments have not been shown. But even if there has been a discrimination against the plantations on Hawaii in the matter of valuation when compared with plantations on the other islands this fact does not afford a reason for reducing the assessments if they have been made in good faith and do not in fact constitute an overvaluation of the property in question. It has been held by this court in several cases that a proper assessment cannot be reduced on appeal merely because other property in the vicinity has been assessed too low in comparison—the assessor having acted in good faith and not having assessed other property in general at a lower rate. *Chilton v. Shaw*, 13 Haw. 250; *Re Taxes Catholic Mission*, 22 Haw. 764. Certainly if the fact that the same assessor has assessed other property at a lower rate as shown in the cases above cited would not authorize a reduction of the assessment appealed from then the fact that the assessor of another division has assessed property in his division at a lower rate should not affect the assessments here appealed from if they have been made in good faith and do not in fact constitute an overvaluation of the properties in question. There is nothing before us to show that the assessments involved in these appeals have not been made in good faith. It should, and will, therefore, be our endeavor to test the valuation of the several properties

Opinion of the Court.

involved by the rules laid down in the statute and the many decisions of this court.

There has been a contention put forth in behalf of the taxpayers by witnesses called in their behalf that the mature and growing crops of cane upon these plantations have no value. The reasoning is that under the circumstances surrounding these plantations the crops could not be manufactured into sugar by any one other than the plantation owning the mill and that because of this fact, considered as separate items of property, they could not be sold and therefore have no value and should not be considered in arriving at a valuation of the tangible assets or that at most the expected profits from said crops are the highest value that should be considered.

Property is to be assessed at its full cash value. (Sec. 1241 *supra*.) This court has held that full cash value means the value for purposes of sale if the property is salable, or if not, what it would be worth if salable. (*Re Taxes of James B. Castle*, 15 Haw. 1.) If the taxpayers' contention that the crops of these plantations could not be sold is correct then some test other than the salable value must be resorted to. It is a well known fact that fairly accurate estimates of the yield of each crop are made by plantation managers before tax return time and the managers' estimates for the crops on the plantations here involved have been given in evidence. The price of sugar on January 1, 1919, had been fixed by the government for the 1919 crop and the cost of converting a standing crop into sugar and marketing the product as well as the cost of finishing any immature crops could be forecast with reasonable accuracy so that if a crop were salable its value for the purposes of sale could be reasonably ascertained and we think this value is the thing to be considered in arriving at the value of the tangible assets. In ascertaining the aggregate value of

Opinion of the Court.

the property constituting the basis of an enterprise for profit the statute prescribes that there shall first be included all property combined and forming the basis of such enterprise whether within the definition of real or personal property or not and there shall be deducted therefrom the value of shares in other Hawaiian corporations held or owned by such enterprise, the value of all property on which specific taxes are levied and the value of all property that would not be taxable if not so combined and made the basis of an enterprise for profit. (Sec. 1241 *supra*.) Section 1240, above quoted, includes growing crops in the definition of personal property. Upon the authority of this statute alone the contention that the growing crops should not be considered is untenable, besides this court has always taken the value of such crops into consideration in estimating the value of tangible assets.

Neither do we think that there is any merit in the contention that the profit which will be made from a crop is the sole criterion of its value upon a given date. Let us suppose that on the first day of January, the date as of which the values are to be fixed, there has been expended upon a crop the sum of \$200,000; that it will require an additional \$200,000 to bring the crop to maturity, harvest and mill and market it; that when so placed upon the market at the price of sugar on January 1 it would bring, if the yield equaled the estimate, \$600,000. According to the theory of counsel the crop would possess a value of only \$200,000 on January 1 while it is clear that its value would be \$400,000 less a reasonable allowance for the use of the money necessary to finish the crop and place the product upon the market. Again, let us suppose that on January 1 a ranchman has a bullock which he has raised at an expense of \$50; that it will cost him \$10 to sell the bullock which when so sold will bring a

Opinion of the Court.

gross return to the ranchman of \$100. According to the theory advanced the bullock would be worth only \$40 because that is all the profit the ranchman would make but it is perfectly clear that the bullock was worth \$90. We think that in this connection it should be borne in mind that in estimating the value of the different items of property which form the basis of an enterprise for profit we are not considering the value of the enterprise but are undertaking to ascertain the value of the different items separately as one of the things to be considered in connection with all other matters having a bearing upon the enterprise as a whole and that when so considered the enterprise may be found to have a value more or less, according to the circumstances of each case, than the aggregate value of the parts constituting the whole. It is true, as this court has several times said, that the value of the whole will not be less than the aggregate value of the parts unless by reason of their combination the value of the parts has depreciated. *Re Taxes Union Mill Co.*, 23 Haw. 46; *Re Taxes Waiakea Mill Co.*, 24 Haw. 333.

Counsel for the taxpayers have emphasized the fact that conditions brought about by the recent great war have cast new and great burdens upon the sugar industry. It is true that the cost of almost everything, such as labor, material, freight rates and taxes has advanced as a result of the war and all of these things must be considered in arriving at the valuation of a business enterprise. But the effects of the war upon the industry were not all of this character. Prior to January 1, 1919, the price of the 1919 crop of sugar had been fixed and assured at \$145.60 per ton, an advance of more than \$25 per ton over the price prevailing for the 1918 crop and this fact should be taken into consideration in arriving at the value of the 1919 crop on the land. Under normal

Opinion of the Court.

conditions when the price of sugar on the first of the year might not be the price at which it would sell throughout the year it would be proper to consider the average price which could be expected over a period of years in estimating the value of the crop for that year, but where, as was the case on January 1, 1919, the government had fixed the price for that crop the fixed price should be used in estimating the value of that crop as a separate item of property. The method of considering the amount and value of the sugar which a crop will produce as a means of arriving at the value of the crop has been criticized, but we find that this method is of long standing, this court having approved it as far back as the case of *Gay & Robinson v. Assessor*, 17 Haw. 227, decided in 1905. In that case the only criticism of the result obtained by the assessor by this method was that he used the price of sugar at a time when it was particularly high instead of such as could reasonably be expected during a considerable period and had not made sufficient deductions for cutting and milling.

This court has also held that the full cash value of a piece of property is what it would sell for when sold in the manner such property is usually sold. Large acreages of cane are not usually sold at all as such but the plantation does dispose of its crops by manufacturing them into sugar and selling the sugar. Under all the circumstances we think that the method of considering the estimated yield of a crop in connection with the price of sugar, where all proper allowances for additional cost are deducted, furnishes the most satisfactory test of the value of a growing crop of cane.

The assessor has also been criticized for the method used by him in estimating the value of other taxable assets such as roads, bridges, fences, buildings, machinery, railroads and their equipment. The Onomea and

Opinion of the Court.

Paauhau companies each failed to place a valuation upon the different items of property combined and forming the basis of the enterprise for profit returned by it for taxes and Hutchinson plantation has only done so in part. The assessor has testified that he tried to get information from the managers of these plantations as to the value of the assets, but that in compliance with instructions received by the managers from the Honolulu office the information was refused. He says that having failed to receive any assistance from the plantation manager he resorted to the annual corporation exhibit filed with the treasurer and took the statement of value found therein for everything except the real estate and growing crops. These he estimated from his own knowledge of values and from information gathered from talking with men familiar with such matters. As to Honokaa, which did place a value upon the separate items of its taxable assets in its tax return, he took its valuation on all except the land and crops and these he estimated in the same manner as in the other cases. The statute does not require the return of property combined as an enterprise for profit to state the value of the various items separately, the aggregate value thereof being all that the statute requires (Sec. 1254 R. L. 1915), but the general and better practice is for the return to include the taxpayer's estimate of the value of each item of the combined property. Of course the assessor would not be justified in using an erroneous valuation because of the fact that the taxpayer had failed to place its estimate upon the separate items of property neither would he be bound by the values given by the taxpayer if found to be erroneous when tested by the rules laid down for his guidance which vary with different classes of property. For instance, this court held in *Alexander v. Fornander*, 6 Haw. 322, 325, that the cash value of an irrigation ditch for

Opinion of the Court.

tax purposes is what it is worth as a utility rather than what it cost because nothing of considerable value can be moved from its site. In this connection we will notice the testimony of Mr. Richard A. Cooke, vice-president of Brewer & Company, who are agents for some of the plantations involved, and the principal witness for the taxpayers. He gave the book value of each item of taxable property which represents the cost at the time acquired without allowing anything for depreciation. He next gave the amount of depreciation which the company had written off of each item of property, the percentage of depreciation written off of each item annually being governed by the perishable or non-perishable character of the particular item as found by the experience of business men generally. The depreciation is then deducted from the book value leaving a net value from which he has in most cases made heavy deductions because, as he says, the plantation if closing out could not remove the property and realize much if anything from a sale of the materials. To illustrate, in one of the cases his testimony is that the railroad and rolling stock, which cost \$208,068.93 and has a net value after depreciations have been deducted of \$110,027.93, is only worth \$30,000 because the roadbed which represents \$65,000 of the value could not be sold if the plantation should close down. Practically the same contention is made as to the value of roads and fences, that is, that roads and fences which cost \$37,934.66 and carried on the books as of the net value of \$29,099.90 are only worth \$100 because if scrapped there would be salvaged material probably worth this amount. The contention of Mr. Cooke in this respect simply means that the property of the plantation, when considering it as separate items, should be taken at its scrap value, although he objected to that term and called his valuations closing out values. By what-

Opinion of the Court.

ever term his method of arriving at values may be called it does not give the cash value of the property contemplated by the statute. To follow his theory to its logical conclusion, the Young Hotel building would be worth for taxation purposes only the value of the materials that could be salvaged if the building were demolished. Neither is the method used by the assessor in arriving at the value of the tangible assets by using the full book value contained in the annual corporation exhibits to be approved and would undoubtedly show too great a valuation unless proper deductions were made for depreciation because of use. Mr. Cooke has said that in writing off depreciations they endeavor to write off a sufficient percentage each year to take up the original cost by the time the thing is worn out and must be discarded and that if the thing is worn out and discarded before the depreciations written off equal the cost the percentage adopted has been too small. This statement cannot be refuted and the assessor should therefore be careful to ascertain the physical condition of each piece of property in order that proper allowance be made for the decrease in value. Of course where the physical condition of a plantation property is being properly maintained the replacements would to a large extent offset depreciations. All of these things should be considered in arriving at the valuation to be placed upon such property.

We will now take up the evidence in each case and undertake to arrive at a correct estimate of the value of the several properties.

ONOMEA SUGAR COMPANY.

As we have heretofore stated this company returned its property at \$3,400,000, the assessor valued it at \$4,250,000 and the tax appeal court fixed its value at \$4,045,117. In arriving at this valuation the assessor says he first con-

Opinion of the Court.

sidered the sale of shares but found that so few had changed hands that such sales were entitled to very little weight in determining the value of the plantation. The evidence shows that Onomea is capitalized at \$1,500,000, the stock being divided into 75,000 shares of the par value of \$20. Of this stock 1284 shares were sold in 1918 on the Honolulu exchange and 2605 on the San Francisco exchange at prices ranging from \$44 to \$50 per share. If the prices at which shares of this stock sold in 1918 were taken as the sole criterion the value after deducting the non-taxable assets would be far below the value returned by the company. This court has said that "the main consideration is the future; the past being of importance chiefly in determining what the future is likely to be," (*Tax Assessment Appeals*, 11 Haw. 237) and that "the effect of all the factors is shown largely by the actual sales of stock, for this shows what persons who actually invest consider the property to be worth" (11 Haw. 244). However, this court has also said that "It would be entirely unsafe to test values of corporation property solely by sales of shares of its stock or by prices offered without regard to the number of shares sold or bid for or whether they are bought for investment or speculative purposes. No hard and fast rule of testing values can be made to apply in all cases and yet practical common sense and a desire to assess at their fair value furnish an excellent guide." *Tax Assessor v. Wailuku Sugar Co.*, 18 Haw. 423. The number of shares of Onomea sold in 1918 constitutes a small fraction of the total number of shares issued by that company and we know nothing of the character of the purchasers or whether the purchases were made for investment or speculative purposes. Under these circumstances we think that both the assessor and the taxpayer were justified in not giving to these sales of shares a controlling con-

Opinion of the Court.

sideration. The assessor next took up the question of net profits made by Onomea over a period of four years and over a period of eight years, taking the information as to profits from the corporation exhibit of the company for the year ending December 31, 1918. For the four year period he found that the net average profits amounted to \$676,494 annually. Taking the eight year period he found that the net profits amounted to \$505,998 annually. There is some discrepancy between these figures and those given by a witness for the taxpayer, as \$485,414 for the average annual net profit for the eight year period. According to Mr. Shipman's figures the profits for eight years amounted to \$4,047,984. The tax appeal court in fixing the value at \$4,045,117 arrived at a figure a little less than eight times the average annual profits for the eight year period as given by Mr. Shipman, or considered as a percentage at a rate a little better than 12½%. We are not advised which figures the tax appeal court accepted or how it arrived at its valuation but it may be inferred that it considered the capitalization of the past profits in connection with all other facts as furnishing a reliable guide to its value. The evidence of both the assessor and the taxpayer as to the value of the tangible assets outside of the land and growing crops furnishes very little information for the reasons pointed out in our general discussion. The evidence does show that this plantation is in good condition and has maintained a fairly uniform production of sugar. It owns 25,822 acres of land of which 5733 acres are classed as cane land and the remainder as forest and pasture land. It leases 1742 acres of which 1420 acres are cane land and the remainder forest. The evidence clearly justifies the valuation of \$200 per acre for the cane land and \$10 per acre for the forest and pasture land placed upon it

Opinion of the Court.

by the assessor. The plantation is not irrigated but has an abundance of rain.

A decision of the tax appeal court, though not having the conclusiveness of a jury verdict, should not be disturbed for light reasons. *O. R. & L. Co. v. Assessor*, 17 Haw. 163; *In re Taxes Bishop Estate*, 13 Haw. 671; *In re Tax Assessment Appeals*, 11 Haw. 235, 236. The burden is on the appellant to show that the decision of the tax appeal court is erroneous. *Assessor v. Wilder*, 17 Haw. 425; *Lihue Plantation Co. v. Farley*, 13 Haw. 283. Neither appellant in this case has shown to our satisfaction that the decision of the tax appeal court is erroneous.

The decision is therefore sustained.

HUTCHINSON SUGAR PLANTATION COMPANY.

The assessment of this plantation for 1917 was \$1,575,000; for 1918 it was \$1,750,000. The company returned it for 1919 at \$1,460,000 and the assessor raised it to the same as the 1918 assessment and the tax appeal court fixed it at the same as the 1917 assessment. Both the assessor and the company have appealed.

There were no sales of stock in 1918 so neither the assessor nor the company has given any consideration to the value of its shares. The assessor and taxpayer practically agree on the net profits of this company for both the four and eight year periods, the assessor having accepted the profits given in the corporation exhibit for the four years preceding the assessment at \$290,409 and the eight year period at \$210,541, while the evidence of Mr. Cooke places these profits at \$290,110 and \$203,936 respectively. If we capitalize these profits for the eight year period as given by Mr. Cooke at 12½% we would arrive at a value of \$1,631,488, and if we accept the profits for the eight year period as given in the corpora-

Opinion of the Court.

tion return at the same rate of capitalization we would get a value of \$1,684,328.

The manager of the plantation in making the tax return has placed the value of the assets of the company at \$2,113,331.48 which includes \$195,889.21 of non-taxable property and property upon which a specific tax is paid. This return also shows a depreciation reserve of \$314,388.53. If we deduct the non-taxable assets and the depreciation reserve we get a valuation of \$1,603,053. But the assessor did not accept the valuation of the manager on land and crops. He found a less value for the land and a greater value for the crops, the manager's valuation of the lands being \$554,894 and the assessor's valuation \$530,855. The manager's valuation of the crops was \$277,056, while the assessor considered them worth \$534,810. The manager's overvaluation of the land is probably due to a mistake on his part as to the acreage owned by the company and would indicate that Mr. Shipman's valuation is more nearly correct. Mr. Cooke has given his opinion that the real estate is worth only \$197,407, but in the face of the return and Mr. Shipman's evidence his estimate can hardly be accepted. Mr. Cooke also disagreed with both Mr. Shipman and the manager of the plantation as to the value of the growing crops, his estimate being \$102,350, although contending that considered as a separate item it has no value. But Mr. Cooke tells us that the total cost of additional cultivation, harvesting and marketing in 1918, including everything which he thinks constitutes a proper charge on these accounts, cost about \$97 per ton of sugar on this plantation and as sugar was worth \$145 the difference would be approximately \$48 per ton or a total on the estimated yield of \$334,740. He then discounts this at 4%, leaving \$321,350. He then insists on a further discount of 15% on the value of the whole plantation as a

Opinion of the Court.

fair profit which would reduce the value of the 1919 crop to \$120,350. But Mr. Cooke further tells us that prior to January 1 there had been expended on the 1919 crop the sum of \$72,780 or \$10.40 per ton of sugar expected from the crop. It is clear from his estimate of cost that he expects the plantation to make a profit of \$248,570 after having been allowed a discount of 4% on the cost. If we add the amount expended to the expected profit we get \$321,350 from which we will deduct 10% for contingencies, leaving \$289,215 as the value of the 1919 crop according to Mr. Cooke's figures. Mr. Cooke is in better position to know the actual cost on this plantation than the assessor and we think the figures given by him rather than his estimate or the figures given by the assessor furnish the best estimate of the value of this crop. The evidence as to the 1920 crop is not nearly so enlightening, but estimating it in the same way we think \$100,000 would be fair to both parties. If we deduct from the manager's valuation of real estate \$24,039 to make it conform to Mr. Shipman's estimate and add to the manager's estimate of the value of the crops \$111,461 to make it conform to our estimate we would have \$87,422 to add to his valuation of the assets which would bring the value of the assets up to \$1,690,475. But Hutchinson is a non-irrigated plantation situated in Kau where the rainfall is not plentiful, though considering these facts the production of sugar has been remarkably uniform, there having been only one year within the past eight years when there was a marked variation in the tonnage of sugar per acre, the yield being by years as follows: 1911, 3.85 tons; 1912, 3.43 tons; 1913, 3.05 tons; 1914, 3.26 tons; 1915, 5.28 tons; 1916, 3.92 tons; 1917, 3.83 tons and 1918, 3.45 tons, or an average for the eight years of 3.76 tons and for the past four years of 4.12 tons. The plantation also leases a considerable proportion of its land. Of

Opinion of the Court.

3849 acres of cane land cultivated it owns 2594 and leases the balance, while of its lands of all classes it owns 17,423 out of 45,310 owned and leased together.

All things considered we think that this plantation as a whole should be valued at \$1,650,000.

PAAUHAU SUGAR PLANTATION COMPANY.

Only 180 shares of stock out of a total of 100,000 shares issued by this company sold in 1918 and we are not informed at what price these sold. Neither side relied on the price of shares as indicating the value but confined its investigation to tangible assets in connection with profits and other things affecting the value of the plantation as a whole.

In this as in the Onomea case the assessor for the same reason resorted to the corporation exhibit for the value of the tangible assets except land and crops which he estimated in the same manner that he estimated Onomea. What we have said in regard to this in the Onomea case applies here as well.

Mr. Cooke, for the taxpayer, has tabulated the taxable tangible assets giving the original cost, the depreciation, the net value after deducting depreciation and his estimate of sale value. It is evident, however, from his evidence that his estimated sale value is based on an entirely erroneous theory as to what value is to be considered. We have already discussed this line of evidence in our general discussion of these cases. It seems to us that the net value after making proper deductions from the cost of each item for depreciation would give the full cash value unless the value has been increased or decreased by reason of their combination. The taxable assets according to Mr. Cooke's tabulation have an aggregate net value of \$1,224,778 if we accept his valuation of the lands and crops. He places the value of the land at \$140,907,

Opinion of the Court.

the 1919 crop at \$150,960 and the 1920 crop at \$77,033. Mr. Shipman thinks the lands are worth only \$104,993, the two crops worth \$521,700, while the corporation exhibit places the value of the growing crops at \$523,708 and the real estate at the same value contained in Mr. Cooke's schedule. If we accept all of Mr. Cooke's figures except the land and crops and take Mr. Shipman's figures for these two items we have a value of \$1,482,571.

Considered on the basis of capitalization of profits, however, the value fixed by the assessor and the tax appeal court will give this plantation a less favorable rate than Onomea while it is evident that the plantation is less favorably situated and not as good or consistent a producer as Onomea nor as consistent as Hutchinson though the tonnage per acre for the eight year period is about the same as Hutchinson. The large showing of taxable assets is the only thing that could justify the valuation sustained by the tax appeal court. This valuation is over \$230,000 less than would be justified if the plantation had made a favorable showing in profits. The profits for several years prior to 1918 were very large. 1918 showed a loss of \$137,928 due to a very severe drought and a smaller acreage than usual. But the estimated crop for 1919 is much nearer the normal size. Under these conditions too much weight should not be given to the temporary falling off of profits. We think that the reduction of \$230,000 from the net value of the taxable assets is as liberal as the facts warrant and therefore sustain the valuation of \$1,250,000. •

HONOKAA SUGAR COMPANY, LIMITED.

Only 200 shares of the stock of this company out of a total of 100,000 shares issued sold in 1918 at prices ranging from \$4.75 to \$6.25 per share. The company had a bonded debt of \$600,000, less a sinking fund of \$36,029.31.

Opinion of the Court.

leaving a net bonded debt of \$563,970.69 and a large floating debt, one item alone being \$195,784 due its agents. "In ascertaining the aggregate value of all the property owned by a corporation the amount of the debts, if any, of the corporation should be added to the selling price of the shares of its capital stock." *Assessor v. Brewer & Co.*, 15 Haw. 29. If any considerable number of shares of this company had sold in 1918, even at the lowest figure quoted, it would indicate that the purchasers thought its total assets, taxable and non-taxable, have a value of well over \$1,000,000. The non-taxable assets are valued by the witness for the taxpayer at a little over \$300,000, and the stock sales would therefore indicate, if anything at all, that the assessor and the tax appeal court had not overvalued the property in fixing its value at \$700,000.

The detailed return of the taxpayer shows a valuation of its taxable assets at \$522,594.50. We will notice a few discrepancies between the valuation of items in the detailed return and the valuation placed on the same items in the statement of assets also contained in the return and which we assume is copied from the annual exhibit. In the detailed return the cane crops are valued at \$78,062 while in the statement of assets they are valued at \$473,814.28. In the detailed return merchandise is valued at \$60,000 while in the statement of assets the same item is valued at \$138,071.18. In the detailed return flumes, ditches and pipe-lines are valued at \$6000 and in the statement of assets at \$30,000. These few comparisons indicate either extreme conservatism of this company in appraising its property for taxation purposes or extreme recklessness in appraising it for the purpose of its annual exhibit. It is quite evident that Honokaa has a large amount of property involved in an enterprise which, judged by past performances, is almost entirely unprofit-

Opinion of the Court.

able due to a combination of circumstances such as drought, disease in the cane and an expensive plantation to run. This fact should be given due consideration in fixing the value of the property as an enterprise for profit although it should not be allowed to overshadow all other considerations. In the past ten years five years have shown a profit and five a loss almost equal to the profits. Of the four years last past all except 1918 showed good profits. 1918 showed a rather heavy loss. The outlook for 1919 was much more favorable than 1918 had proved to be due, we would judge, primarily to the fact that a much heavier yield of sugar was expected, but judged by the past this plantation can expect drought periodically and it has not sufficient water to properly irrigate in periods of drought.

We find that this plantation within the past ten years has been assessed all the way from \$1,200,000 (1910) to \$450,000 (1918). The assessment was never below \$1,000,000 until 1914 when it was reduced to \$600,000. It was raised to \$675,000 in 1916, to \$700,000 in 1917, lowered to \$450,00 in 1918 and again raised to \$700,000 in 1919.

Had this plantation been able to repeat in 1918 the same showing made in the three preceding years we would have no hesitation in sustaining the assessment at \$700,000, but in view of the extremely poor showing made as a profit earner we think that a return to the valuation of 1914 at \$600,000 will do substantial justice to both parties. Of course if the outlook improves to such an extent that the profits of 1915 to 1917 may be expected the relatively large holdings of this company would justify a substantial raise.

J. Lightfoot, First Deputy Attorney General, for the assessor.

Robertson & Olson for the taxpayers.

Syllabus.

HATTIE K. CRAWFORD *v.* JENNIE STEWART.

No. 1192.

MRS. W. H. CRAWFORD *v.* MRS. VIOLET FEELEY.

No. 1193.

PETITION FOR REHEARING.

FILED JANUARY 2, 1920.

DECIDED JANUARY 26, 1920.

COKE, C. J., KEMP AND EDINGS, JJ.

A contract of hiring in which the compensation was fixed at a stated sum per month but without any specified term of employment constituted a hiring at will and not by the month and in the absence of any established usage to the contrary either party had the right to terminate the employment at any time without notice and upon such termination the party discharged would be entitled to compensation only to the time of such termination.

Per Curiam: The plaintiff has presented a petition for rehearing in the above entitled cases alleging as grounds therefor, among others, that the decision rendered by a majority of the justices (*ante* page 226) was based upon propositions of law concerning which she had no opportunity to be heard; that said decision was based upon authorities and cases concerning the value of which as precedents she had no opportunity to be heard, and that the majority opinion entirely overlooked the fact that no notice was given of an intended termination of the contract for services.

When these cases were heard two of the members of this court—the Chief Justice and Justice Edings—were absent and the matters were heard before Justice Kemp and Circuit Judges J. T. DeBolt and James J. Banks.

Opinion of the Court.

At the time of the filing of the petition for rehearing both the Chief Justice and Justice Edings had returned and the question arose as to who constituted the court for the purpose of hearing this petition. There being some doubt in the mind of the court as to who should pass upon the sufficiency of the petition, at the urgent request of counsel for the petitioner the matter was referred to the same justices and judges who took part in the decision of the cases and it has also been considered by the court as at present constituted.

After a careful consideration of the petition by the court as now constituted, as well as by the judges who took part in the original decision, the petition for rehearing is denied, Circuit Judge DeBolt adhering to his dissenting opinion heretofore filed and all the members of the court and Circuit Judge Banks adhering to the majority opinion heretofore filed.

It is the view of the court that plaintiff's contention that the majority opinion was based upon propositions of law concerning which she had no opportunity to be heard is not well taken for the reason that she did both in her briefs and in her oral argument cite authorities in support of her contention that a hiring at a stipulated monthly sum constituted a hiring for a month. It is true that the defendant did not argue to the contrary. We do not think, however, that this fact would preclude the court from laying down a proposition of law contrary to that contended for by the plaintiff and supporting it by authorities not considered in the argument.

In answer to plaintiff's contention that the majority opinion overlooked the fact that no notice whatever was given of any intention to terminate the contract we hold that the requirement of such notice would abrogate entirely the main principle laid down in our opinion to the effect that a hiring for a stipulated sum per month with-

Opinion of the Court.

out anything further being agreed upon to fix the term of hiring constitutes an indefinite hiring and is terminable at the will of either party. We did not cite any authority upon this proposition nor refer to it in the majority opinion for the reason that we did not consider it as having any application to the case before us. We find, however, in the case of *The Pokanoket*, reported in 156 Fed. at 241, the circuit court of appeals for the fourth circuit held that a verbal contract between the owner of a vessel and a marine engineer for the services of the latter in which his wages were fixed at a stated sum per month but without any specified term of employment constituted a hiring at will and not by the month and in the absence of any established usage to the contrary either party had the right to terminate the employment at any time without notice and upon the employee's discharge he was entitled to wages only to the time of such discharge. See also *The Pacific*, 18 Fed. 703 and *The Rescue*, 116 Fed. 380.

We feel that the plaintiff has been given ample opportunity to present her cases in this court as well as in the district and circuit courts, all of which courts have reached the same conclusion.

Thompson, Cathcart & Lewis for the petition.

Syllabus.

E. W. BARNARD AND A. L. MOSES, CO-PARTNERS
DOING BUSINESS UNDER THE FIRM NAME
OF E. W. BARNARD *v.* ANTONE NOBRIGA.

No. 1245.

RESERVED QUESTIONS FROM CIRCUIT COURT FOURTH CIRCUIT.
HON. C. K. QUINN, JUDGE.

ARGUED JANUARY 17, 1920.

DECIDED JANUARY 28, 1920.

COKE, C. J., KEMP AND EDINGS, JJ.

SET-OFF AND COUNTER-CLAIM—*reply not required.*

There is no provision in our statutes requiring a plaintiff to reply or otherwise plead to the allegations contained in a set-off interposed by a defendant.

SAME—*judgment of default.*

Under our laws a judgment of default against a plaintiff for failure to plead to a set-off is not authorized.

OPINION OF THE COURT BY COKE, C. J.

This case has come up on reserved questions from the circuit court of the fourth circuit. The plaintiffs instituted an action in assumpsit against the defendant in the court below demanding judgment for \$1475.76. The defendant interposed an answer denying generally the allegations contained in the complaint and then incorporated into his answer a set-off against plaintiffs for which he claimed judgment in assumpsit against plaintiffs in the sum of \$682.90. The plaintiffs interposed no reply, demurrer or other answer to the set-off of defendant and after the lapse of about twelve months the defendant secured an order of default against the plaintiffs. Thereupon the plaintiffs moved for an order setting aside the default upon the ground that the same was irregularly

Opinion of the Court.

and inadvertently entered and was contrary to the statutes of the Territory of Hawaii authorizing entry of defaults in actions at law and that the court had no jurisdiction to enter the default.

The judge of the circuit court refrained from passing upon the merits of the motion and has reserved to this court two questions as follows: (1) "Has the court under the provisions of the Revised Laws the authority to enter a default upon a set-off of the defendant such as was pleaded in this cause in defendant's answer?" (2) "Would this court be authorized in setting aside the default heretofore entered by it in this cause upon the foregoing record?"

Should reserved question No. 1 be answered in the negative it follows that question No. 2 should be answered in the affirmative.

The plaintiffs maintain that under the Hawaiian statutes no reply of any kind to a set-off pleaded by a defendant is required or even contemplated. Section 2360 R. L. 1915 provides that "It shall be incumbent upon every defendant served with process of summons as hereinbefore provided, within the time specified in the summons or order of publication, to file with the clerk of the court an answer to the plaintiff's demand," etc., and the following sections indicate the procedure to be followed by plaintiff to obtain judgment of default against the defendant for failure to answer as required by section 2360. Section 2385 R. L. provides that "It shall be competent for the defendant in any civil action to plead an off-set of like kind and denomination, existing in the same right, between him and the plaintiff," etc. And section 2390 R. L. provides that "The plaintiff shall be entitled to every ground of defense against such set-off, of which he might have availed himself, in an action brought against him on the same ground." Section 2392

Opinion of the Court.

R. L. provides that where a set-off has been pleaded judgment shall be rendered in favor of the party to whom a balance is found due for the amount of such balance. It will be noticed that there is no provision in the statute requiring a plaintiff to reply or otherwise plead to the allegations contained in a set-off interposed by a defendant. If this court should attempt to so interpret the statute as to require a reply or demurrer to a set-off still the time for filing such reply or demurrer would be left to conjecture unless we went further and fixed the time, all of which would impose duties and burdens which the legislature apparently deemed it unwise to prescribe.

The defendant relies upon the opinion of this court in *Holt v. Lycurgus*, 10 Haw. 72. But that opinion only touches upon the subject incidentally and by way of dicta and cannot be accepted as an authority dealing with the question now before us.

The general rule announced by text writers and laid down in the decisions on the mainland requires a plaintiff to reply or demur to a counter-claim or suffer judgment of default on motion of the defendant. See 24 R. C. L. 878; *Gunn's Administrator v. Todd*, 21 Mo. 303 and *Magpie Gold Mining Co. v. Sherman*, 23 S. D. 231. But a careful examination of the authorities upholding this rule discloses that the same has been adopted in the presence of local statutory provisions expressly requiring a plaintiff to reply or demur to a set-off or counter-claim and upon his failure to do so a judgment of default may be taken against him. "When the answer contains new matter constituting a counter-claim the plaintiff may within thirty days reply to such matter denying generally or specifically each allegation controverted by him * * * and the plaintiff may in all cases demur to an answer containing new matter," etc. Sec. 130 Code Civ. Proc., Rev. Codes S. D. 1903. Again in the same statutes (Sec.

Opinion of the Court.

145) : "Every material allegation of new matter in the answer, constituting a counter-claim, not controverted by the reply, as prescribed in section 130 of this code shall for the purposes of the action be taken as true." And we find similar provisions in the statutes of Missouri, Oregon, Oklahoma, and in fact most if not all of the states on the mainland. But in this Territory we have no such statutory provision, hence the authority for the rule is absent in Hawaii. If it be argued that the rule should be enforced by virtue of the common law the answer is that the doctrine of set-off did not exist at common law but was borrowed from the civil law and is dependent for its existence upon statutory enactment. *United States v. Eckford*, 6 Wall. 484; *Hall v. United States*, 91 U. S. 559; *Scott v. Armstrong*, 146 U. S. 499; *Roach v. Privett*, 90 Ala. 391; *Woods v. Ayers*, 39 Mich. 345; *Patterson v. Patterson*, 59 N. Y. 574.

It may well be said that our statutes are deficient in that they do not require a plaintiff to controvert the allegations contained in a set-off so that the defendant as well as the court may be advised in advance of the trial just what are the issues involved. But this we think is a matter properly calling for legislative and not judicial remedy.

The reserved question No. 1 is answered in the negative and the reserved question No. 2 is answered in the affirmative.

Fred Patterson (*Russell & Patterson* on the brief) for plaintiffs.

H. L. Ross (*W. S. Wise* with him on the brief) for defendant.

Syllabus.

TERRITORY v. SAMUEL KAUHANE, A. M. CABRINHA, WILLIAM A. TODD, EUGENE H. LYMAN, A. A. AKINA, JAMES AKO AND JULIAN YATES.

No. 1171.

REHEARING OF MOTION TO DISMISS.

ARGUED MAY 13, 1919.

DECIDED MAY 24, 1919.

COKE, C. J., KEMP AND EDINGS, JJ.

APPEAL AND ERROR—*exceptions—costs.*

Section 2514 R. L. 1915 provides that upon the allowance of a bill of exceptions and the deposit of twenty-five dollars or a bond of the same amount by the party excepting with the clerk of the court for costs to accrue in the supreme court the questions arising thereon shall be considered by the supreme court. This statute expressly designates all that is required of an appellant in order to entitle him to have the questions presented by the bill of exceptions considered by the supreme court and it is beyond the power of the supreme court by rule or otherwise to add to these requirements.

SAME—*same—same.*

If subdivision 5 of Rule 8 of the supreme court is to be construed as placing burdens upon an appellant contrary to the statute above referred to then the rule is in conflict with the statute and must give way to it.

COURTS—*power of to prescribe rules.*

The power of a court to make rules for governing the practice and conducting the business of the court is always subject to the limitation that such rules must not contravene a statute or the organic law.

Per Curiam: Upon motion of appellee an order of this court was made and entered on the 2d day of May, 1919, dismissing appellants' bill of exceptions for failure on the part of the appellants to pay the costs of court accrued in

Opinion of the Court.

the circuit court as held to be required by subdivision 5 of Rule 8 of the supreme court. The rule provides that "After final judgment a party seeking a review in this court by exceptions must within a reasonable time not exceeding twenty days after the allowance of his bill of exceptions pay the necessary costs and file the necessary bond or deposit cash in lieu thereof." Thereafter appellants duly filed a petition for a rehearing which has been granted. Although the rule of court above quoted would indicate otherwise, and contrary, we think, to a prevailing impression, there is no statutory provision requiring the payment of costs as a prerequisite to the right of a review by a bill of exceptions. Section 2513 R. L. 1915 contains no such requirement and section 2514 provides that "Upon the allowance of such bill of exceptions and the deposit of twenty-five dollars, or a bond of the same amount by the party excepting with the clerk of such court, for costs to accrue in the supreme court, the questions arising thereon shall be considered by the supreme court." This statute expressly designates all that is required of an appellant in order to entitle him to have the questions presented by his bill of exceptions considered by the supreme court and it is beyond the power of this court, by rule or otherwise, to add to these requirements. Section 2260 R. L. 1915 provides that "The supreme court may, from time to time, make rules consistent with existing laws for regulating the practice and conducting the business of said court, and thereafter revise the said rules at its discretion; but in no case shall have power to impose costs not expressly authorized by law." The power of any court to make such rules as may be deemed necessary is always subject to the limitation that such rules must not contravene a statute or the organic law. See *Goodwin v. Bickford*, 20 Okl. 91, also *Territory v. Kapiolani Estate*, 20 Haw.

Syllabus.

548. When an appellant has secured the allowance of a bill of exceptions and has deposited \$25 or a bond of the same amount with the clerk to secure the payment of costs to accrue in the supreme court he is entitled by the provisions of the statute to have his exceptions heard and if subdivision 5 of Rule 8 of this court is to be construed as placing burdens upon an appellant contrary to statute then the rule is in conflict with the statute and must give way to it.

The order of court, heretofore made and entered as aforesaid, dismissing appellants' bill of exceptions is hereby revoked and set aside and the cause is restored to the calendar of the supreme court.

J. Lightfoot, First Deputy Attorney General, for the motion.

W. H. Smith contra.

TERRITORY v. WILLIE FONG YEE.

No. 1224.

ERROR TO CIRCUIT COURT SECOND CIRCUIT.

HON. L. L. BURR, JUDGE.

SUBMITTED JANUARY 20, 1920.

DECIDED JANUARY 30, 1920.

COKE, C. J., KEMP AND EDINGS, JJ.

SEDUCTION—evidence.

In a case in which the defendant is charged with the crime of seduction it is not error to permit the prosecutrix to testify that she became pregnant as the result of the intercourse with the defendant and that she thereafter gave birth to a child, of which the defendant is the father.

Opinion of the Court.

SAME—same—leading questions.

Leading questions are permissible to arrive at facts when ignorance or modesty prevents a full answer to a general interrogatory.

SAME—same—letters written by defendant.

When the prosecutrix in a seduction case produces letters which she claims to have received by mail from the defendant and testifies that she is familiar with defendant's handwriting and that said letters are in his handwriting, the letters are admissible in evidence without any further evidence to connect the defendant with the writing.

SAME—same—same—corroboration.

Letters identified only by prosecutrix may be considered as corroborative of her testimony on the issues requiring corroboration, since her testimony need be corroborated only as to the sexual intercourse and the promise of marriage.

SAME—corroboration.

Whether in a given case there was any corroboration of the testimony of the prosecutrix is a question of law.

SAME—same—instruction to the jury.

Under a statute which provides in effect that the court may charge the jury whether there is or is not evidence (indicating the evidence) tending to establish or rebut any specific fact involved in the case it is not error for the court to instruct the jury "that the court has ruled that there is some evidence in corroboration of the testimony of the prosecutrix in this case but the weight and sufficiency of that testimony is for the jury to determine" without indicating to the jury what evidence the court considered corroborative of the prosecutrix' testimony.

OPINION OF THE COURT BY KEMP, J.

The defendant was tried and convicted under an indictment charging him with the offense of seduction. The case is before us upon writ of error sued out by the defendant in which the following errors are assigned: (1) That the court erred in the misreception of evidence; (2) that the court erred in the rejection of evidence; (3) that the court erred in allowing leading questions continuously; (4) that the court erred in giving instruction No. 5 requested by the prosecution; (5) that the

Opinion of the Court.

court erred in allowing in evidence letters purported to have been signed by plaintiff in error; (6) that the court erred in not granting the plaintiff in error's motion for a dismissal of said cause. The second assignment of error has been withdrawn.

Under the first assignment of error the defendant complains of the action of the court in allowing the prosecutrix to testify over his objection that she became pregnant from her intercourse with him on or about the date alleged in the indictment and that she had since given birth to a child of which he was the father. Just prior to the giving of the evidence complained of the prosecutrix had testified that on or about the 28th of April, 1918, the defendant had slept with her and that she had permitted him to sleep with her as the result of his promise to marry her. She was then asked what happened to her after this time she had just spoken about, evidently referring to the fact that she had permitted the defendant to sleep with her, to which she replied, "I was in the family way." Following this she gave evidence to the effect that she had since given birth to a child which was born on February 5, 1919, and that defendant was its father. The defendant insists that the evidence of the birth of the child is immaterial and the only purpose of the testimony showing that a child was born was to prejudice the jury against him. In *Cunningham v. The State*, 73 Ala. 51, the defendant being on trial for the crime of seduction, the fact that the prosecutrix had given birth to a child was admitted in evidence and the court instructed the jury that it might consider that fact, if proved in connection with other evidence, in determining whether the defendant had sexual intercourse with the prosecutrix. The giving of this instruction was assigned as error and the court in discussing it used the following language: "The fact that the prosecutrix gave

Opinion of the Court.

birth to a child was certainly evidence that she had been cohabited with; and that was a material ingredient in the offense charged. There was no error in telling the jury they might consider this fact, if proved in connection with the other evidence, in determining whether the defendant had had sexual intercourse with her." So in this case the fact that the prosecutrix gave birth to a child is evidence that some one had theretofore had sexual intercourse with her and the further testimony that the defendant was the father of her child is merely another way of saying that he had theretofore had sexual intercourse with her. We find no error in the admission of this testimony.

Under assignment No. 3 the defendant complains that the court abused its discretion in allowing leading questions. The questions complained of will not be set forth in this opinion. It will be sufficient to say that many of the questions set forth as leading are not in fact leading. It may be conceded, however, that a number of the questions complained of were leading. Counsel for the defendant concedes that the allowance of leading questions is generally within the discretion of the court and that there will be no reversal on this ground unless there has been an abuse of discretion. In the case before us the prosecutrix was a half-Chinese who knew nothing of the Chinese language and spoke very poor English. With a witness of this character it is very difficult to conduct an examination in the same manner that an examination would be conducted with a witness who thoroughly understood the language of the court. "In the confusion and embarrassment of witnesses leading questions are often found necessary and especially in the case of those who by reason of tender years or old age, ignorance or some infirmity are unable to state important facts without some aid or suggestion. Leading questions are per-

Opinion of the Court.

missible to arrive at facts when modesty prevents a full answer to a general interrogatory." Jones' Commentary on Evidence, Vol. 5, Sec. 818, p. 101. In cases of this character the modesty of the young woman who claims to have been seduced would tend to prevent full answers to general interrogatories and would justify the court in going further in allowing leading questions than would be proper in an ordinary case. We do not feel that the court in this case abused its discretion in allowing such leading questions as were permitted.

Assignment No. 5 complains of the action of the court in allowing to be introduced in evidence certain letters purporting to have been written by the defendant. The prosecutrix produced certain letters which she claimed she had received from the defendant through the mail, together with the envelopes in which she claimed to have received them. The envelopes are addressed to the prosecutrix at Waiakoa, Maui, and are dated April 27, 1918, and June 22, 1918, respectively. The letter of April 27 purports to have been written at Keokea, Kula, Maui; the one of June 22 purports to have been written at Wailuku, Maui. The prosecutrix testified that she was familiar with the handwriting of the defendant and that the two letters in question were in his handwriting. Neither of said letters is signed with the full name of the defendant. The one of April 27, 1918, concludes as follows: "I am Naughty Boy Willie." The one of June 22 concludes: I am Your Loving One Willie." After the prosecutrix had testified that she was familiar with the handwriting of the defendant and that these letters were in his handwriting the letters and envelopes were admitted as evidence. The defendant insists that this did not constitute sufficient foundation for their admission in evidence and cites as authority therefor *Rogers v. State*, 101 Ark. 45, 141 S. W. 491, 49 L. R. A. N. S. 1198;

Opinion of the Court.

Carrens v. State, 77 Ark. 16, 91 S. W. 30; *Bishop v. State*, 151 S. W. (Tex.) 821, and *James v. State*, 161 S. W. (Tex.) 472. The cases cited are not authority for the contention of the defendant that this showing was not sufficient to admit these letters in evidence. They are authority, however, for the further contention of defendant under assignments Nos. 4 and 6 that the letters having been identified alone by the evidence of the prosecutrix they cannot be used to corroborate her testimony upon issues requiring corroboration. We think, however, in view of the holding of this court in *Territory v. Capitan*, 23 Haw. 771, to the effect that the prosecutrix' testimony need be corroborated only as to the promise of marriage and the sexual intercourse, the prosecutrix' testimony that the letters were in the handwriting of the defendant needs no corroboration to make them admissible for all purposes. If this were not so we think that the testimony of the prosecutrix in this case has been corroborated on both of the issues requiring corroboration by evidence other than the letters in question. The father of the prosecutrix testified that some time during the school vacation in 1918 the defendant came to his place and asked his permission to marry the prosecutrix; that he told the defendant it would be all right if they both agreed and that the defendant thereupon replied that they had agreed to get married. In the case of *Territory v. Fernandez*, 24 Haw. 617, it was held that where the defendant some two months after the alleged seduction, being asked by the father of the prosecutrix what his intentions towards his daughter were, replied, "I am going to get married this Christmas coming," furnished no corroboration of the promise to marry because the language of the defendant in that case only expressed an intention which he entertained at the time of the conversation and that there was nothing to indicate that

Opinion of the Court.

defendant had not in fact resolved to marry the prosecutrix on the very day of the alleged conversation. This, however, does not apply to the statement of the defendant in this case, he having told the father of the prosecutrix that he and the prosecutrix were then engaged to be married. This would indicate a promise some time prior to the conversation with the father though no time was mentioned. George Cummings, deputy sheriff of the district of Wailuku, testified that on the 28th day of January, 1919, the defendant told him that in the months of March and April he had had connection with the prosecutrix; that in June he went to the father's house in company with another boy to ask for the hand of the prosecutrix; that the father gave his consent and they were to be married some time in July but that his parents objected to his marrying the girl because she was only part Chinese; that he wanted to marry the girl, but his parents "butted in" so he refused to marry her and that he knew at the time that the prosecutrix was in the family way. Louis K. Fernandez, police officer at Waiakoa, Kula, Maui, testified that in October he had a conversation with the defendant in which defendant said in substance that he was going to marry prosecutrix but that he was afraid he would be drafted so he was holding back and he would wait to receive further notice from the draft board. This witness further stated that when he asked the defendant if he knew the prosecutrix was in the family way he said, "I believe so," and when asked how he knew it he said, "I also have been there. I staid a few nights with her." There can be no question that this testimony sufficiently corroborates the prosecutrix' testimony to the effect that the defendant had had sexual intercourse with her and we believe also sufficiently corroborates her further statement that the defendant had promised to marry her prior to the alleged seduction. As was said

Opinion of the Court.

in the case of *Territory v. Capitan, supra*, "Sexual intercourse is seldom susceptible of direct proof. It may be inferred from circumstances, opportunities and the conduct of the parties, and in cases of this character the corroboration will generally be found to depend upon circumstantial evidence. Each case must depend upon its own circumstances and the views expressed by the courts in the decided cases are helpful only in a general way." It would be impossible to lay down a general rule as to what will and what will not be considered sufficient corroboration to authorize the submission of the case to the jury. The evidence which we have reviewed as given by the father of the prosecutrix and the two officers, taken in connection with the contents of the two letters in evidence, furnishes sufficient corroboration of the testimony given by the prosecutrix to require the submission of the case to the jury. The letter of April 27 discloses the fact that there had theretofore been some character of courtship of the prosecutrix by the defendant. He addressed her as "My dear Beloved Anna," referred to "a kiss that night" and avowed that "I can not write much because I love you so." The letter of June 22 refers to the fact that the writer had heard of her father saying they (the writer and prosecutrix) are to be married, and continues: "Tell him I don't want to hear no body talked about us you and I are going to get married. Because the old man is a great one to go and talke. Now I hear a little bit about us from one Chinese, Robert Wong's father, telling me that your father told him we were going to get married and you don't eat poi, because you lived on poi. You must tell the old man what I told you. Be sure and tell him not to go out and big mouth any thing about us. Ask him if my parents don't want me to get married with you what is his mind. To let

Opinion of the Court.

us two married or not. Because I won't take nobody's word. When I says married that is married."

If there should be any doubt as to the sufficiency of the testimony of prosecutrix' father and the two officers to corroborate the testimony of the prosecutrix as to the promise of marriage we think the letters in question undoubtedly furnish sufficient corroboration to require the submission of the case to the jury. The court therefore committed no error in overruling the defendant's motion for a dismissal of the cause and complained of in defendant's sixth assignment of error.

This leaves only the fourth assignment of error to be considered. At the request of the prosecution the court gave the jury the following instruction: "You are instructed that the court has ruled that there is some evidence in corroboration of the testimony of the prosecutrix in this case but the weight and sufficiency of that testimony is for the jury to determine."

Section 2435 R. L. 1915 is as follows:

"The jury shall in all cases be the exclusive judges of the facts in suits tried before them, and the judge presiding at any jury trial (hereafter in this chapter named the court), shall in no case comment upon the character, quality, strength, weakness or credibility of any evidence submitted, or upon the character, attitude, appearance, motive or reliability of any witness sworn in a cause; provided, however, that nothing herein shall be construed to prohibit the court from charging the jury whether there is or is not evidence (indicating the evidence), tending to establish or to rebut any specific fact involved in the cause, nor shall it be construed to prohibit the setting aside of a verdict rendered by such jury, in a proper case, as being against the weight of evidence, and the granting of a new trial therein."

The defendant insists that if the court should have given such instruction at all it was incumbent upon it to

Opinion of the Court.

indicate what evidence constituted the corroboration. It will be seen from the wording of the statute quoted that the court in instructing the jury is permitted to tell it whether there is or is not evidence (indicating the evidence) tending to establish or to rebut any specific fact involved in the cause. As we understand this statute the court would have been permitted to indicate to the jury what evidence constituted sufficient corroboration to submit the case to it but does not make it incumbent upon the court to designate the evidence. We think the court is much less likely to invade the province of the jury in refraining from mentioning the specific evidence which it regards as sufficient corroboration to authorize the submission of the case to the jury than would be the case if it undertook to point out the evidence. The jury was plainly told that the weight and sufficiency of that testimony was for it to determine.

Upon the conclusion of the case for the Territory the defendant's motion for dismissal compelled the court to pass upon the question of whether or not the testimony of the prosecutrix had been corroborated and to announce its ruling thereon in the presence of the jury. The instruction complained of told the jury no more than the court had already told it in ruling upon the motion to dismiss the cause and constituted no invasion of the province of the jury. In *Territory v. Capitan, supra*, it was held that "Whether, in a given case, there was any corroboration of the testimony of the prosecutrix is a question of law, but where there was some such evidence its sufficiency would be for the jury to determine." The instruction complained of is in accord with the law as there announced.

The defendant insists that the instruction complained of is practically the same as the instruction in the case of *Territory v. Nishi*, 24 Haw. 677, 683, which was con-

Opinion of the Court.

demned by this court. In the *Nishi* case the court at the request of the prosecution instructed the jury as follows: "If you are satisfied in this case beyond a reasonable doubt that the victim of this alleged crime, Shigeko Murata, made prompt and early complaint of the wrong and injury committed by this defendant upon her person and to her character and chastity, such evidence may be received and considered by you as corroborative of the other testimony given by her in this case." In commenting upon this instruction we said: "This instruction should not have been given for various reasons. First, it is objectionable because it assumes as a fact that defendant committed a wrong and injury upon the person of the prosecutrix; second, because no complaint of the alleged assault was made by the prosecuting witness, and finally and independently of the other reasons, even had a complaint been made by the prosecuting witness, the instruction is an incorrect statement of the rules governing the effect and purpose of such a complaint."

From the above quotation it will be seen that the instruction was condemned for reasons entirely inapplicable to the instruction in question and is therefore not authority for the defendant's contention in this case.

Finding no error in the record the assignments of error are overruled and the judgment affirmed.

E. Murphy for plaintiff in error.

E. R. Bevins, County Attorney of Maui, and *W. F. Crockett*, Deputy County Attorney of Maui, for defendant in error.

Syllabus.

TERRITORY OF HAWAII, FOR THE USE AND
BENEFIT OF THE COUNTY OF MAUI, *v.*
HUGH HOWELL AND THE UNITED STATES
FIDELITY AND GUARANTY COMPANY.

No. 1155.

ERROR TO CIRCUIT COURT SECOND CIRCUIT.

HON. L. L. BURR, JUDGE.

ARGUED JANUARY 20, 1920.

DECIDED FEBRUARY 5, 1920.

COKE, C. J., KEMP, J., AND CIRCUIT JUDGE DEBOLT IN
PLACE OF EDINGS, J., DISQUALIFIED.

JUDGMENTS—*admissibility as evidence against stranger.*

For the mere purpose of establishing the fact of its own rendition and those legal consequences which result from that fact, the judgment itself is not only admissible as the proper legal evidence but usually conclusive to prove that fact.

SAME—*same.*

A judgment is not evidence against a stranger to the suit in which it was rendered to prove the existence of any of the facts necessary to support that judgment.

APPEAL AND ERROR—*final judgment in appellate court.*

In an action at law where the parties are as a matter of right entitled to a jury trial the appellate court can upon a reversal direct the entry of a judgment only where the error occurred after entry of the verdict.

SAME—*same.*

An appellate court in reversing a judgment for the plaintiff on the ground of insufficiency of the evidence will direct a judgment for the defendant only when it appears that no new evidence can be procured upon a new trial.

OPINION OF THE COURT BY KEMP, J.

This is a writ of error to review a judgment rendered by the circuit court of the second circuit upon the ver-

Opinion of the Court.

dict of a jury awarding the plaintiff damages for the breach of the conditions of a bond given by the defendant Howell as principal and the United States Fidelity and Guaranty Company as surety for the faithful performance of his (Howell's) duties as county engineer of the County of Maui. The appointment of Howell as county engineer, the validity of the ordinance under which he was appointed and the execution of the bond by both principal and surety were all admitted and it was further admitted that the copies of the bond and ordinance attached to the petition are true copies. The pleadings, including the copies of the bond and ordinance attached thereto, were reviewed by this court in an opinion reported in 23 Haw. at 797 and need not be repeated here. It will be sufficient to say that the plaintiff sought to recover the amount of a judgment which the County of Maui had paid to one Chas. Reinhardt, said judgment having been recovered by Reinhardt against the County for personal injury received by him from having fallen into a washout in the public road in the County of Maui in July, 1915, while the defendant Howell was county engineer of said County. In addition to the admissions referred to above the plaintiff introduced evidence to show that there was a washout in Hana in the County of Maui in April, 1915, about twenty feet wide and from ten to sixteen feet deep extending across the public highway and that the defendant Howell was notified of said washout by the district overseer on the next day after said washout occurred; that he visited and inspected the washout but did nothing to repair it or to erect barriers or warnings of the dangerous condition of the highway. This we think constituted *prima facie* proof of the neglect of duty on the part of the defendant Howell. For the purpose of proving all other facts on which the judgment of Reinhardt

Opinion of the Court.

against the County was based, such as that Reinhardt fell into the washout and was injured while in the exercise of due care, as well as to prove the amount of damages suffered by the County and sought to be recovered in this case, the plaintiff offered, and the court received, in evidence the pleadings, decision and judgment in the case of Reinhardt against the County. No other evidence was offered by the plaintiff to establish these facts and upon the conclusion of the plaintiff's case the defendants made a motion for a directed verdict on the grounds (1) that there is no evidence of any notice to Mr. Howell of the pendency of the original suit between Reinhardt and the County or notice to come in and defend the same; (2) that the judgment found in that case is merely evidence of damage and that such judgment was rendered on the pleadings; (3) that such judgment is not evidence to show that this particular accident occurred at all or that Reinhardt was in the exercise of due care. The motion for a directed verdict was overruled and this ruling has been assigned as error. Error has also been assigned to the ruling of the court in admitting in evidence the record in the Reinhardt case for any purpose other than to show what the issue was in that case and that a judgment was rendered therein and the amount of said judgment.

That matters which have been once determined by judicial authority cannot again be drawn into controversy as between the parties and privies to the determination is a principle too well settled to need the citation of authority. A judgment in one suit will be conclusive in every other where the cause of action and the parties are the same notwithstanding a change in the form in which the action is brought. It is also a universal rule that a judgment concludes the parties and their privies only as to the grounds covered by it and the facts neces-

Opinion of the Court.

sary to uphold it. A judgment is offered in evidence either to establish the mere fact of its own rendition and those legal consequences which result from the fact or is offered to prove not only the fact that such a judgment has been rendered and so let in all the necessary and legal consequences, but as a medium of proving some fact found by the verdict or upon whose supposed existence the judgment is based. For the first of these purposes, that is, for establishing the fact that such a judgment had been rendered and all the consequences of such a judgment, the judgment itself is invariably not only admissible as the proper legal evidence against the world but usually conclusive to prove that fact. The mere fact that such judgment was rendered can never be considered as *res inter alios acta*, neither can the legal consequences of such a judgment be so considered. But with reference to any fact upon whose supposed existence a judgment is founded the proceeding may or may not be *res inter alios* and consequently may or may not be evidence according to the circumstances, considering the nature of the facts themselves and the parties. In Freeman on Judgments, 3 ed. Sec. 417, it is said: "Judgments are also available as evidence against third parties by way of inducement or to prove the existence of any collateral fact. Thus if a principal should be sued for the negligence of his agent the judgment against him in this suit would be evidence in a suit against the agent by the principal for the purpose of showing what the consequences of the negligence had been; 'as evidence of the *quantum* of damages though not as to the fact of the injury.' * * * A judgment against a sheriff for the default of his deputy is at least *prima facie* evidence against the latter and his sureties to prove that the sheriff had been subjected to the pay-

Opinion of the Court.

ment of a certain amount of liability." See also 1 Greenl. Ev., 14 ed., Sec. 527.

In accordance with these authorities we think that the pleadings, decision and judgment in the case of Reinhardt against the County were admissible in evidence to show what the issue was in that case and to show that the County had been subjected to a certain amount of liability but were not evidence against the defendants of the existence of any of the facts necessary to support that judgment.

The question of notice to these defendants of the pendency of the former suit or what character of notice is necessary in this jurisdiction does not enter into this case because it is not alleged or contended that either of the defendants in this case had any character of notice of the pendency of the former suit. We therefore refrain from a discussion of this subject.

The plaintiff has argued that the court in holding that the judgment in the case of Reinhardt against the County was evidence of the facts on which that judgment was based was justified by the opinion of this court when the case was before it on exceptions as above referred to. It must be borne in mind, however, that this court then had before it for review the action of the circuit court in sustaining a special demurrer to the complaint on the ground that the negligence complained of was that of either the district overseer or of the board of supervisors and was not negligence for which the county engineer could be held liable, and that damages caused by negligence of the nature specified in the complaint are not among those obligations for which the surety stood responsible under the bond.

This court held that the circuit court in sustaining this demurrer committed error and said that "If the failure of the defendant Howell to perform the duty

Opinion of the Court.

assigned to him resulted in loss to the County by its being obliged to pay the judgment recovered by Reinhardt there was a breach of the condition of the bond and both principal and surety became liable to suit." (23 Haw. p. 800.) But all of the allegations of the complaint for the purpose of the demurrer were admitted to be true and the complaint alleged that Reinhardt fell into the washout and that he was injured. It is true that the complaint does not allege that Reinhardt was in the exercise of due care when the accident occurred but no point was made of this omission in the demurrer and that question was not before the court. What the ruling of the court would have been had this question been raised it is not proper to now inquire. We do not think that the opinion of this court on the demurrer should be given the far-reaching effect contended for by the plaintiff. On the contrary we think that it is entirely consistent with the conclusion we have reached.

The defendants have argued that the judgment should not only be reversed but that we should order a judgment for the defendants. We do not sustain this contention. "In an ordinary civil action at law, in which the parties are entitled as a matter of right to a jury trial, the appellate court can reverse the judgment and remand the cause with directions to the trial court to enter the proper judgment only where the error occurred after the verdict was entered. Where errors have intervened prior to the entry of the verdict and the cause is reversed therefor it must be remanded for a trial *de novo*." 2 R. C. L. p. 281, Sec. 235. "It seems to be the general rule that an appellate court has the power to render final judgment on the reversal of a judgment for the plaintiff on the ground of insufficiency of the evidence to support it, and that the court will exercise this

Opinion of the Court.

power if the evidence is manifestly insufficient and it does not appear that any new evidence can be procured on a retrial of the cause. But if the court is of the opinion that other evidence may be produced on a new trial or is unable to say that such evidence may not be produced it will not render final judgment but will remand the case for a new trial. And it has been held that before an appellate court can render final judgment on the reversal of a judgment for insufficiency of the evidence it is not enough that it appears improbable that the appellee will be able to recover on a new trial, but it must appear that he cannot." 2 R. C. L. p. 282, Sec. 237.

This case comes within both principles above quoted under which an appellate court will not render a final judgment. The contention of the defendants that a judgment in their favor should be entered is therefore overruled.

For errors pointed out the judgment is reversed and the cause remanded for further proceedings not inconsistent with this opinion.

A. Withington (Castle & Withington on the brief) for plaintiffs in error.

E. Vincent, D. H. Case and E. Murphy filed a brief for Hugh Howell, one of the plaintiffs in error.

E. R. Bevins, County Attorney of Maui, for defendant in error.

Syllabus.

IN THE MATTER OF THE ESTATE OF CECIL
BROWN, DECEASED.

No. 1222.

APPEAL FROM CIRCUIT JUDGE FIRST CIRCUIT.

HON. J. T. DEBOLT, JUDGE.

SUBMITTED JANUARY 30, 1920.

DECIDED FEBRUARY 5, 1920.

COKE, C. J., KEMP AND EDINGS, JJ.

ESTATES—annuities—residuary estates.

Where an annuity is payable out of the residuary estate of a testator the probate court has jurisdiction to set apart a sufficient sum to answer the annuity and to pay the remainder of the residue to the residuary legatee, and this jurisdiction will be exercised in a proper case notwithstanding the opposition of the annuitant.

OPINION OF THE COURT BY COKE, C. J.

Cecil Brown, late of Honolulu, died in the year 1917, leaving an estate of the approximate value of \$250,000, all of which was disposed of by his last will and testament. The will was duly admitted to probate and in September, 1917, letters testamentary were issued to H. M. von Holt. After making certain bequests and devises the will contains the following clause: "All the rest, residue and remainder of my estate, real, personal and mixed, and wheresoever situate, I give, devise and bequeath unto my said nephew, Heinrich Martens von Holt, and to his heirs; the only charge on it being that if at any time after my death the estate is in funds and can pay the sum of two hundred and fifty dollars a month so long as my stepdaughter Irene K. Dickson is living, and my reputed daughter Mary K. Brown is living, that one hundred and fifty dollars of said sum

Opinion of the Court.

of two hundred and fifty dollars be paid said Irene K. Dickson each month for and during the term of her natural life, and to my reputed daughter Mary K. Brown, during the term of her natural life the remainder, being the sum of one hundred dollars." The rights of Irene K. Dickson have been adjusted in a manner satisfactory to her and are not involved herein. Mary K. Brown has since married, her name now being Mary K. Jarrett. On October 2, 1918, Mr. von Holt, the executor, filed in the circuit court his final accounts and asked for an order approving the accounts, distributing the estate and determining the trust. At the hearing of this petition the executor offered to set aside in trust United States liberty bonds of the par value of \$35,000, drawing interest at $4\frac{1}{4}$ per cent., to secure the payment to Mary K. Jarrett of her annuity for life of \$100 per month. Mrs. Jarrett, through her attorneys, while opposing the offer of the executor, did not then, and does not now, make any claim that the property proposed to be set aside is not ample to secure to her the payment of her annuity of \$100 per month during her life time as provided for in the will, but she contends that the annuity constitutes a charge upon the estate and therefore the corpus of the entire residuary estate must be held intact during the life time of the annuitant. The judge of the circuit court entered an order approving the final accounts and authorized, empowered and directed the executor to set aside and deliver to the trustee named in the trust deed, which deed was submitted to and approved by the court, United States liberty bonds of the value of \$35,000 bearing interest at $4\frac{1}{4}$ per cent. per annum, to be held by the trustee under the terms of said trust deed for the payment of said annuity of \$100 per month to Mrs. Jarrett for the term of her natural life, and further authorized, empowered and directed the

Opinion of the Court.

executor to deliver over to Heinrich Martens von Holt all the rest, residue and remainder of the property belonging to the said estate as the residuary legatee free and clear from any lien to secure the payment of Mrs. Jarrett's annuity. From this order Mrs. Jarrett has appealed to the supreme court.

As already indicated counsel for Mrs. Jarrett make no claim that the annuity of their client is not amply and fully secured by virtue of the order of the circuit court but they insist that the circuit court had no authority to make the order setting aside the bonds as security for the payment of the annuity and also that the court was without authority or jurisdiction to distribute said estate to von Holt individually but should have distributed it to him as trustee to be held by him as security for the payment of the legacy reserved to Mrs. Jarrett under the will.

It is obvious that the application of the rule contended for by appellant while affording her no protection or benefit whatsoever might work a great hardship upon the residuary legatee as well as a loss to the estate itself. The legatee's estate would be withheld from him during the entire life time of the annuitant and the estate would be burdened with the expense of administration during that period. If an estate valued at \$250,000 must be held intact to insure the payment of an annuity of \$1200 per annum then the same rule would require that an estate of many times that value be retained intact for the entire life time of an annuitant to protect an annuity of a mere nominal amount. And if the annuitant happened to be an infant distribution of any part of the corpus of the estate might thus be delayed for three-fourths of a century or even for a greater period, dependent, of course, upon the tenure of life enjoyed by the annuitant. Such a drastic rule would

Opinion of the Court.

inflict needless loss and hardship and is repugnant to common sense and reason.

This same subject has heretofore had the attention of the courts and the uniform rule adopted is that where an annuity is payable out of the estate of a testator the court has jurisdiction to set apart sufficient to answer the annuity; that the annuitant is not entitled to have the estate of the testator realized upon and converted into money further than is necessary for the payment of his debts, funeral and testamentary expenses; after this has been done his right is limited to having the annuity sufficiently secured by the setting apart of such part of the estate as may be adequate for that purpose. 3 C. J. pp. 216, 217; 1 R. C. L. pp. 12, 13. A case similar to the one at bar was before the supreme court of judicature of England, Ch. Div., and that court announced the rule to be that "Where an annuity is payable out of the clear residuary estate of a testator the court has jurisdiction to set apart a sufficient sum to answer the annuity and to pay the remainder of the residue to the residuary legatee, and this jurisdiction will be exercised in a proper case notwithstanding the opposition of the annuitant." *Harbin v. Masterman*, 1 L. R. Ch. Div. (Eng.) 351. See also *Scott v. Leak*, 42 L. R. Ch. Div. (Eng.) 570. The American rule seems to be the same. "A residuary bequest if given subject to payment of an annuity to another for life is charged with the annuity and before the property is delivered to the legatee the executors should set apart an amount sufficient to meet the annuity from the income." *Healey v. Toppan*, 45 N. H. 243. See also *Cummings v. Cummings*, 146 Mass. 501, 508; *Treadwell v. Cordis*, 5 Gray 341, 351.

Counsel for appellant misinterpret, we think, the import of the language used by this court in two opinions

Opinion of the Court.

heretofore rendered which deal with the same will now before us. See *Jarrett v. von Holt*, 24 Haw. 419; *Estate of Brown*, 24 Haw. 443. In those opinions it was held that the legacy of \$100 a month reserved to Mrs. Jarrett by the terms of the will of Cecil Brown constituted a charge or lien against all the assets of the estate which is prior to any rights enjoyed by the residuary legatee but did not transfer the estate or any interest therein to the annuitant. We see no reason to depart from these conclusions nor do we see anything therein inconsistent with the further conclusion that the claim or lien subsisting in favor of the annuitant does not amount to a vested interest in the property of the estate nor does the existence of such claim or lien preclude the court in the exercise of its probate jurisdiction from putting aside sufficient of the estate to meet the annuity and then distributing the remainder to the residuary legatee.

The order appealed from is affirmed.

Andrews & Pittman for appellant.

Frear, Prosser, Anderson & Marx for appellee.

Syllabus.

CITY AND COUNTY OF HONOLULU *v.* HONOLULU
RAPID TRANSIT & LAND COMPANY.

No. 1251.

MOTION TO DISMISS APPEAL.

ARGUED FEBRUARY 2, 1920.

DECIDED FEBRUARY 11, 1920.

COKE, C. J., KEMP AND EDINGS, JJ.

APPEAL AND ERROR—*carriers.*

An appeal does not lie directly to the territorial supreme court from an order made by the public utilities commission requiring a carrier to relocate its car tracks in the public highways of the city of Honolulu.

OPINION OF THE COURT BY COKE, C. J.

This is an appeal by the Honolulu Rapid Transit & Land Company, respondent-appellant, from an order of the public utilities commission of Hawaii, made and entered on December 11, 1919, requiring the transit company to remove its street railway tracks from the present location thereof along the mauka or east side of Ala Moana, or Moana road, in the city of Honolulu, and to relocate the same in double track at or near the center of Ala Moana conformably to the map and plan on file with the public utilities commission. That portion of the street-car tracks of the transit company to be affected by the order of the utilities commission extends along Ala Moana south from Richards street to Keawe street. This order was issued on the petition of the City and County of Honolulu presented to the public utilities commission and after due notice and hearing was had thereon. The City and County now moves to dismiss the appeal of the transit company.

Opinion of the Court.

This opinion will be confined to the merits of paragraph 1 of the motion which reads as follows: “(1) That there is no appeal and no means provided by law for an appeal from the order of the public utilities commission from which the respondent-appellant has purported to take its appeal to this court.” Section 2234 R. L. 1915 specifies the only circumstances under which an appeal may be taken from an order of the public utilities commission directly to the supreme court. That section is as follows: “All rates, fares, charges, classifications, rules and practices made, charged or observed by any public utility, or by two or more public utilities jointly, shall be just and reasonable, and the commission shall have power, after a hearing upon its own motion, or upon complaint, and in so far as it is not prevented by the constitution or laws of the United States, by order to regulate, fix and change all such rates, fares, charges, classifications, rules and practices, so that the same shall be just and reasonable, and to prohibit rebates and unreasonable discriminations between localities, or between users or consumers under substantially similar conditions. From every order made by the commission under the provisions of this section an appeal shall lie to the supreme court of Hawaii in like manner as an appeal lies from an order or decision of a circuit judge at chambers. Such appeal shall not of itself stay the operation of the order appealed from, but the supreme court may stay the same, after a hearing upon a motion therefor, upon such conditions as it may deem proper as to giving a bond and keeping the necessary accounts or otherwise in order to secure a restitution of the excess charges, if any, made during the pendency of the appeal in case the order appealed from should be sustained in whole or in part.”

Counsel for the City and County of Honolulu argues

Opinion of the Court.

that the public utilities commission in issuing the order complained of was not proceeding under the authority of section 2234 because the order does not regulate, fix nor change rates, fares, charges, classifications, rules or practices made, charged or observed by the public utility, but that the commission was exercising the authority formerly vested in the superintendent of public works by chapter 54 R. L., and which was expressly delegated to the commission by the Act of Congress of March 28, 1916. (See 39 U. S. Stat. L., Pt. 1, Ch. 53, pp. 38, 39.)

Whether the public utilities commission was properly acting within the scope of its power and authority we are not now called upon to determine but we think it obvious that the commission was not attempting to regulate rates, fares, charges, classifications, rules and practices charged or observed by the public utility and for this reason no appeal lies to the supreme court in the first instance. It cannot be doubted that the transit company is entitled to have recourse to the courts of the Territory, for "all acts of the public utilities commission herein provided for shall be subject to review by the courts of said Territory." (See 39 U. S. Stat. L., Pt. 1, Ch. 53, pp. 38, 39.) And even where legislatures have attempted to make the conclusions of the commission final and beyond the reach of the courts these statutes have been held invalid as depriving the carrier of its right to a judicial investigation to which it is entitled under the guaranty of due process of law. *Chicago, Milwaukee & St. Paul R. Co. v. Minnesota*, 134 U. S. 418; *Missouri-Pacific R. Co. v. Tucker*, 230 U. S. 340; *Chicago, etc., R. Co. v. Jones*, 149 Ill. 361; *Com. v. Atl. Coast Line R. Co.*, 106 Va. 61. If the order made by the public utilities commission of Hawaii requiring the transit company to relocate its car tracks violates the

Syllabus.

legal rights of the company the mode of judicial relief against the order is by bill in equity or other appropriate proceeding before a territorial court having original jurisdiction of such matters, the proceeding before that court being, of course, reviewable here.

The motion is granted and the appeal herein dismissed.

R. A. Vitousek, First Deputy City and County Attorney, for the motion.

A. L. Castle contra.

E. M. Watson of the firm of *Watson & Clemons*, counsel for the Public Utilities Commission, *amicus curiae*.

JAMES L. HOLT v. D. L. CONKLING, TREASURER
OF THE CITY AND COUNTY OF HONOLULU,
TERRITORY OF HAWAII.

No. 1226.

APPEAL FROM CIRCUIT JUDGE FIRST CIRCUIT.

HON J. J. BANKS, JUDGE.

ARGUED FEBRUARY 4, 1920.

DECIDED FEBRUARY 14, 1920.

COKE, C. J., KEMP AND EDINGS, JJ.

MUNICIPAL CORPORATIONS—*debt limit*.

The Organic Act provides in effect that the legislature may authorize loans by any municipal corporation for certain specified purposes but provides that the total of such indebtedness incurred in any one year shall not exceed 1% of the assessed value of its property. Held, that this is a limitation upon the power of the legislature to authorize the incurring of indebtedness as well as upon the municipality to incur it.

Opinion of the Court.

SAME—same.

An act of the legislature transferring a water and sewer system to a city and requiring it to devote the revenues derived therefrom to the maintenance of said systems and the payment of interest and sinking fund on bonds issued by the Territory for the building of said systems and in the event of a deficiency in said revenue to make up said deficiency out of the general revenue of said city does not authorize nor require said city to incur an indebtedness.

ATTORNEY AND CLIENT—county attorney—appearance for county officer.

A county attorney being elected by the people and his duties prescribed by statute is not subject to the orders of the board of supervisors and may in a proper case represent an officer of the county when sued in his official capacity although instructed not to do so by the board of supervisors.

OPINION OF THE COURT BY KEMP, J.

This is a bill in equity for an injunction by Jas. L. Holt as a citizen and taxpayer of the City and County of Honolulu in his own behalf and in behalf of other taxpayers of said City and County against D. L. Conkling, treasurer of the City and County of Honolulu. The bill after setting forth the parties and the capacity in which they sue and are sued alleges that the defendant as such treasurer is paying to the treasurer of the Territory of Hawaii an enormous amount of money out of the funds owned and controlled by the City and County of Honolulu on January 1 and July 1 of each year for and on account of the Honolulu water and sewer systems contrary to law and the Organic Act in such cases made and provided; that the City and County of Honolulu has no title whatever in said Honolulu water and sewer systems; that the legislature of the Territory of Hawaii in passing such laws and providing that the City and County of Honolulu should pay to the Territory the bonds amounting to \$1,494,611.33 for and on account of said Honolulu water and sewer systems went beyond its powers given under the Organic Act of

Opinion of the Court.

the Territory of Hawaii; that at that date, to wit, the 27th day of April, 1915, when the legislature passed an act making the City and County of Honolulu liable to the Territory in the sum of \$1,494,611.33, the assessed value of the taxable property within the said City and County for the purpose of taxation for territorial and city and county purposes was \$94,564,404; that the City and County of Honolulu under the terms of section 55 of the Organic Act of the Territory of Hawaii had only the power to borrow or incur indebtedness to the amount of 1% per year, to wit, to the amount of \$945,644.04; that such action by the treasurer of the City and County of Honolulu in utilizing the money of the City and County in paying for the interest and sinking fund on said enormous amount of \$1,494,611.33 constitutes a wasting and squandering of the money of the taxpayers of this City and County and would cause the City and County great and irreparable injury and damage. The prayer is for an injunction against the said treasurer, his deputies, agents and employes, forbidding them and each of them from allowing the money of the City and County of Honolulu to be turned over to the treasurer of the Territory of Hawaii for the purpose of paying the interest and sinking fund aforesaid.

The matter came before the circuit judge on demurrer of the defendant to plaintiff's bill. The grounds of demurrer are in part as follows: "1. That said plaintiff in his said bill has not made or stated such a case as entitles him, in a court of equity, to any relief against this defendant as to matters contained and set forth in said bill or any of said matters. * * * 3. That said bill fails to disclose any right whatever in said plaintiff to bring this said suit. 4. That it does not appear from said bill that this plaintiff will suffer any irreparable damage or any damage or damages whatsoever in the prem-

Opinion of the Court.

ises. 5. That it does not appear from said bill what fund or funds the said treasurer utilizes 'in paying for the interest and sinking fund on said enormous sum of \$1,494,611.33' and in that particular fails to show in what manner the said plaintiff suffered or will suffer any injury." Before the hearing on the demurrer the plaintiff filed an objection to the city and county attorney or his deputy appearing for the defendant in the suit. The objection to the appearance of the city and county attorney for the defendant was overruled and the demurrer was sustained and the bill dismissed, the circuit judge holding in effect, as shown by his written decision, that the legislative enactments involved merely made the City and County of Honolulu the agent of the Territory to manage and control the water and sewer departments and did not have the effect of creating any indebtedness against the said City and County of Honolulu. The other grounds of demurrer were not discussed. The case is before us on an appeal from the order sustaining the demurrer and dismissing the bill.

Preliminary to a discussion of the questions presented it will be necessary to review the legislative acts by which the control of the water and sewer systems was transferred from the Territory to the City and County of Honolulu.

By Act 138 S. L. 1913 it was provided (Sec. 1) that not later than July 1, 1914, the water and sewer works and all moneys in the Honolulu water and sewer works funds shall be transferred from the Territory to the City and County of Honolulu or its successor; (Sec. 2) that after such transfer the operation, maintenance, extension and improvement of such works, the collection and expenditure of all moneys on account thereof and the exercise and performance of all powers and duties in relation thereto shall be by such officer as shall be desig-

Opinion of the Court.

nated by law or by the board of supervisors or other governing body, if any, of said City and County, or its successor, subject to the direction of said board or other body. "Upon such transfer said City and County or its successor as the case may be shall assume and become liable for the payment of all indebtedness incurred by the Territory for the operation, maintenance, construction, improvement and extension of said works and the interest thereon and all contracts and other obligations of every kind of the Territory incurred by reason of or in connection with said works to the same extent to which the Territory shall be liable therefor immediately preceding such transfer;" (Sec. 3) that all revenues derived from said works shall be paid into the treasury of said City and County or its successor and there held as a special fund for the following purposes, for which alone it shall be expended: (1) the operation and maintenance of said works; (2) interest on the bonds issued for the extension and improvement of said works; (3) the payment of said bonds, for which purpose there shall be set aside each year not less than such a sum that the aggregate of the sums so set aside with interest thereon compounded yearly at the rate of interest specified in the bonds would amount to the par value of the bonds at maturity, nor more than such a sum that the aggregate of such sums with such interest would amount to the par value of the bonds when they become redeemable; and (4) the extension and improvement of said works. "In whole or partial fulfillment of its obligations under subdivisions (2) and (3) of this section, said City and County or its successor shall after such transfer pay to the Territory on the interest dates of any such bonds as shall have been issued by the Territory, interest upon an amount equal to the par value of such bonds at the rate of interest specified in such bonds and also such

Opinion of the Court.

sum or sums each year during the term for which said bonds shall have been issued, whether refunded or not, that the aggregate of the sums so paid will, compounded annually at such rate of interest, equal at the expiration of such term, such par value, and may so pay to the Territory in any year any additional sum on account of the principal of said bonds, and when any such payment shall be made on account of the principal, the interest payable thereafter shall be reduced correspondingly, and when the aggregate sums so paid on account of the principal of said bonds shall equal the par value thereof, all obligations of said City and County in respect of said bonds, principal and interest, shall be deemed to have been discharged. All amounts so paid to the Territory on account of principal, shall be credited to the territorial sinking fund and such credit when made shall be deemed to have been made under the provisions of the first paragraph of section 1 of Act 97 of the Laws of 1907;" section 4 requires the City and County to charge rates for all water and water power furnished except as otherwise required under contracts heretofore made; section 5 makes it the duty of the City and County to operate and maintain the said works and to pay to the Territory out of the general revenue of the City and County for the purposes stated in divisions 2 and 3 of section 3 deficiencies, if any, which may occur in said special fund; section 6 authorizes the board of supervisors or other governing body of the City and County to fix by ordinance rates for water and sewer privileges; sections 7 and 8 are not pertinent to the questions before us. Section 3 of the above act became section 1861 of the Revised Laws of 1915.

Act 182 S. L. 1915 amended section 1861 R. L. 1915 and provides in substance that the revenues derived from said works shall be paid into the treasury of the

Opinion of the Court.

City and County and there be held in a special fund for the following purposes for which alone it shall be expended: (1) the operation and maintenance of said works; (2) interest at the rate of 4% per annum payable semi-annually on the sum of \$1,494,611.33, which is the present outstanding bonded indebtedness incurred by the Territory for extensions and improvements on said works; (3) the payment of the principal of said amount of \$1,494,611.33 for which purpose there shall be set aside each year for the term of 30 years after July 1, 1916, not less than such a sum that the aggregate of the sums so set aside with interest thereon at the rate of 4% per annum, compounded annually, would amount to the sum of \$1,494,611.33; and (4) the extension of said works. In whole or partial fulfillment of its obligations under subdivisions 2 and 3 of this section said City and County is required to pay to the Territory on July 1 and January 1 of each year the amounts called for under said subdivisions 2 and 3. This amendment did not materially change the act of 1913. It merely declared the amount of the bonds theretofore issued by the Territory for such works and the rates of interest which they bear thereby making more certain the amount of money required of the City and County by the Territory semi-annually and fixed the dates of payment. In all other respects the act of 1913 remains unchanged.

So much of section 55 of the Organic Act of the Territory as is pertinent to this case follows: "Nor shall any debt be authorized to be contracted by or on behalf of the Territory, or any political or municipal corporation or subdivision thereof, except to pay the interest upon the existing indebtedness, to suppress insurrection, or to provide for the common defense, except that in addition to any indebtedness created for such pur-

Opinion of the Court.

poses the legislature may authorize loans by the Territory, or any such subdivision thereof, for the erection of penal, charitable, and educational institutions, and for public buildings, wharves, roads, harbor, and other public improvements, but the total of such indebtedness incurred in any one year by the Territory or any such subdivision shall not exceed one per centum of the assessed value of the property in the Territory or subdivision, respectively, as shown by the then last assessments for taxation, whether such assessments are made by the Territory or subdivision or subdivisions, and the total indebtedness of the Territory shall not at any time be extended beyond seven per centum of such assessed value of property in the Territory and the total indebtedness of any such subdivision shall not at any time be extended beyond three per centum of such assessed value of property in the subdivision, but nothing in this Act shall prevent the refunding of any indebtedness at any time; nor shall any such loan be made upon the credit of the public domain or any part thereof." This section is dealing with the powers of the territorial legislature. It declares that the legislative power of the Territory shall extend to all rightful subjects of legislation not inconsistent with the constitution and laws of the United States locally applicable and sets forth a number of things which the legislature shall and may do as well as a number of things which it shall not do and then follows the language above quoted. From this it seems clear that the legislature is empowered to authorize any subdivision of the Territory to incur indebtedness but is prohibited from authorizing any such subdivision to incur in any one year an indebtedness in excess of 1% of the assessed value of the property in such subdivision as shown by the then last assessment for taxation.

Opinion of the Court.

The question whether debt limit provisions apply to obligations imposed upon municipalities by law as distinguished from those that are discretionary or voluntary has been a troublesome one and the authorities have differed in their answers to the question. It has been held by some state courts that the debt limit provisions of their constitutions are confined to debts contracted by the municipal authorities, in contracting which they exercise discretionary powers, and do not include enforced obligations imposed by statute and which the municipal authorities are required by law to pay and over which they exercise no control. The Oregon cases which support this doctrine rest upon the peculiar wording of the constitution of that State which is in effect that the State or municipality, as the case may be, shall not "create" any debts beyond the specified limit. Most of the state courts, however, which have held that indebtedness incurred under mandate of law is not within the debt limit provisions of their constitutions, have been dealing with cases where the indebtedness was incurred for the purpose of maintaining the political organization of the State or municipality involved and have rested their decisions not upon the letter of the restrictive clause in their constitutions but upon the broad ground of necessity and the rule adopted is that debt limit provisions apply only to those obligations that are entered into voluntarily, that is, to those as to which the governing powers have some discretion. But the constitution in every case where such has been the holding in appropriate language prohibits the State or municipality, as the case may be, from "incurring" or "creating" any debt beyond a specified amount. The following cases hold that the debt limit provisions of the constitutions therein involved apply to all classes of indebtedness where the constitution limit has been ex-

Opinion of the Court.

ceeded: *Dixon County v. Field*, 111 U. S. 83; *Lake County v. Rollins*, 130 U. S. 662; *Lake County v. Graham*, 130 U. S. 674; *Doon Township v. Cummins*, 142 U. S. 366; *City of Guthrie v. Bank*, 4 Okla. 194, 38 Pac. 4.

This construction we think is peculiarly applicable here where the Organic Act instead of being a mere inhibition against the municipality incurring an indebtedness beyond a specified amount has by its very terms placed a limitation upon the power of the legislature to authorize the incurring of such an indebtedness by any subdivision of the Territory in excess of a certain per centum of the value of the taxable property in such subdivision. If we are correct in our construction of this clause in our Organic Act and the act of the legislature in question created or authorized the municipality to incur a debt in excess of the amount authorized the fact that the debt was imposed upon the municipality by statute instead of being voluntarily contracted or incurred by it does not prevent it from coming within the limitation of the Organic Act.

This brings us then to a consideration of the question whether the legislation in question authorized the City and County of Honolulu to incur an indebtedness or imposed an indebtedness upon it. If it did the amount of the debt alleged in the complaint is sufficient to bring it within the restrictive clause of the Organic Act.

This is the question upon which the decision of the circuit judge sustaining the demurrer turned. After reviewing the history of the bonded debt of the Territory incurred for the creation and extension of the water and sewer systems of Honolulu and the history of the ownership and control of said systems as far as he was authorized to take judicial notice thereof, he held that

Opinion of the Court.

the acts in question did not have the effect of creating an indebtedness against the City and County of Honolulu. In this we think the circuit judge committed no error. The act of 1913 in transferring to the City and County of Honolulu the water and sewer systems authorized it to fix the rates to be charged for service and to collect the revenues arising therefrom. It also made it the duty of the City and County to apply said revenues to the purposes enumerated in said act and to make up out of the general revenue any deficiency which may occur in the special fund derived from the operation of said water and sewer systems. If the sums of money which it is alleged the treasurer of the City and County is paying to the Territory are being paid out of the special fund as directed by the act of 1913 the plaintiff as a taxpayer would not be injured thereby and therefore would have no right to complain. If it should be made to appear that a deficiency exists in the special fund (which has not been done in this case) and that the treasurer is about to make payments out of the general revenue of the City and County to make up such deficiency no infringement of the provision of the Organic Act would thereby be shown for the reason that the act under which payment would be made merely directs that such deficiency shall be made up out of the general revenue, that is, out of money then in the treasury of the municipality, and does not authorize or require the municipality to incur any indebtedness whatever for that purpose. "The control of the legislature over the revenues of a municipality derived from taxation is perhaps as absolute as its control of any other species of municipal property. * * * The legislature may also impose upon a municipality the performance of certain duties of a public nature, and may require it either to raise moneys for that purpose or to devote to

Opinion of the Court.

it revenues already on hand." 19 R. C. L. Sec. 73, p. 766.

Our conclusion on the foregoing question makes it unnecessary to discuss any other grounds of the demurrer, but the insistence with which the appellant has urged his contention that the city and county attorney should not be permitted to appear for the treasurer and the public nature of the question render it our duty, we think, to express our views thereon although we do not feel called upon to enter into a general discussion of the question. We think that the appellant's contention that this suit is in effect a suit by the City and County of Honolulu against the Territory of Hawaii and that the city and county attorney in representing the defendant is in effect taking a case against the City and County of Honolulu is not sound. The plaintiff styles himself a taxpayer of the City and County of Honolulu and the defendant the treasurer thereof. The city and county attorney is elected by the people and his duties are prescribed by statute. He is therefore not subject to the orders of the board of supervisors except so far as the law has made it his duty to serve it. The board of supervisors has undertaken to instruct the city and county attorney not to appear for the treasurer in this case. Section 1736 R. L. 1915 makes it the duty of the city and county attorney to give when requested and without fee his opinion to the city and county officers on matters relating to the duties of their respective offices. The law does not specifically make it the duty of the city and county attorney to represent such officers in suits against them in their official capacity but certainly there is nothing inconsistent with his duties to the City and County, which he represents, in so appearing for one of the officers where matters upon which he has given advice are involved. The objection to his appear-

Syllabus.

ance in this case for the treasurer was therefore properly overruled.

The order appealed from is affirmed.

W. C. Achi (*Achi and Achi on the brief*) for plaintiff.

W. H. Heen, City and County Attorney, and *R. A. Vitousek*, First Deputy City and County Attorney (also on the brief) for defendant.

WONG WONG *v.* HONOLULU SKATING RINK, LIMITED, A CORPORATION, MORRIS ROSENBLDT AND FRED HARRISON.

No. 1187.

EXCEPTIONS FROM CIRCUIT COURT FIRST CIRCUIT.

HON. W. S. EDINGS, JUDGE.

ARGUED FEBRUARY 17, 1920.

DECIDED MARCH 1, 1920.

COKE, C. J., KEMP, J., AND CIRCUIT JUDGE DEBOLT IN PLACE OF EDINGS, J., DISQUALIFIED.

APPEAL AND ERROR—*law of the case*.

A question before this court and decided on an appeal cannot be reheard or examined upon a subsequent trial and appeal of the same case.

SAME—*same*.

An opinion of this court reversing a judgment of the circuit court and remanding the cause for further proceedings does not preclude the parties from raising questions on a subsequent trial and appeal not involved in the former appeal.

MECHANIC'S LIEN—*enforcement—defense*.

Any matter that would constitute a good defense to an action

Opinion of the Court.

of assumpsit on the account which is the basis of the lien is a good defense to a suit to foreclose the lien.

SAME—same—same.

If it appears that the account which is the basis of the lien was not due when the suit to foreclose the lien was begun there can be no recovery, and this defense may be set up by other defendants than the debtor.

OPINION OF THE COURT BY KEMP, J.

This case was heretofore before this court upon writ of error to the circuit court sued out by the plaintiff, the circuit court having granted a nonsuit as to the defendants Rosenbledt and Harrison. The judgment of nonsuit was reversed and the cause remanded for further proceedings consistent with our opinion (24 Haw. 181). The case presented to this court upon the writ of error involved only the correctness of the ruling of the circuit judge granting the nonsuit. The circuit judge based his decision on two grounds, namely, that the notice of lien filed by the plaintiff was insufficient in substance and that the plaintiff had failed to show a demand upon defendants Rosenbledt and Harrison for the amount due between the time of filing the notice of lien and the institution of this suit. We held that the decision of the circuit judge was erroneous in both particulars. The plaintiff had shown a demand made upon the Honolulu Skating Rink, Limited, a codefendant of Rosenbledt and Harrison and we held that in view of the contractual relation existing between the skating rink company and the defendants Rosenbledt and Harrison that the demand upon the skating rink company constituted a demand upon Rosenbledt and Harrison.

In view of the fact that the plaintiff now contends that our former opinion has settled practically all of the law of the case and the defendants Rosenbledt and Harrison insist that our former opinion to the effect that

Opinion of the Court.

the demand on the skating rink company constituted a demand upon them is erroneous it becomes necessary for us to determine first whether we are authorized to inquire into the correctness of our former opinion, and if we are not then to determine which of the questions presented by the exceptions our former opinion settled.

In our opinion denying the plaintiff's motion to dismiss the exceptions now before us (*ante* p. 92) we pointed out that the case upon the first trial having been disposed of upon the motion of the defendants Rosenbledt and Harrison for a nonsuit the matters of defense had not been tried and we mentioned the fact that said defendants had given notice that they would rely upon the defenses of illegality, fraud, release and payment. The enumeration by us of these defenses upon which the defendants gave notice they would rely did not purport to be a complete statement of the contents of their answer and is not a complete statement as the answer contains a general denial under which said defendants were entitled to give in evidence as a defense any matter of law or fact (Sec. 2369 R. L. 1915). We held that as some of the exceptions related to alleged errors committed in rulings upon matters of defense they were subject to review and refused to dismiss the exceptions. We did not go further into the question at that time as it was not necessary for us to do so in order to dispose of the question then before us. In addition to the authorities cited by us in that opinion our attention has been called to the case of *Illinois v. Illinois Central R. R. Co.*, 184 U. S. 77. That was a suit by the State of Illinois against the railroad company to compel it to remove certain piers which it had constructed in Lake Michigan. Upon the first trial the court held that the railroad company was the owner in fee of the piers in question and entered a decree in favor of the defend-

Opinion of the Court.

ant. The State appealed to the Supreme Court of the United States where the judgment of the trial court was sustained in so far as it held that the defendant had the title in fee to said piers provided said piers did not extend into the lake beyond the point of practical navigability and sent the case back to the trial court with instructions to determine that question. After a hearing in the trial court on the question of whether the piers extended into the lake beyond the point of practical navigability the trial court found that said piers did not so extend and again entered a decree in favor of the defendant. The State again appealed to the Supreme Court of the United States and argued that the opinion and decree of the Supreme Court were erroneous and should be set aside. The Supreme Court refused to inquire into the correctness of its former opinion and said (p. 93): "Every matter embraced in the original decree of the circuit court and not left open by the decree of this court was conclusively determined as between the parties by our former decree and is not subject to reexamination on this appeal." In *Roberts v. Cooper*, 61 U. S. 467, 481, it is said that "None of the questions which were before the court on the first writ of error can be reheard or examined upon the second. To allow a second writ of error or appeal to a court of last resort on the same questions which were open to dispute on the first would lead to endless litigation." From this it would seem to be well settled that such questions as were determined when this case was formerly before us are now the law of this case and are not now open to inquiry.

The other members of the court, while agreeing with the conclusion that the former opinion of this court to the effect that a demand upon the skating rink company constituted a demand upon Rosenbledt and Harrison is now the law of the case and not open to inquiry, desire

Opinion of the Court.

to express their doubt as to the correctness of that holding. The writer does not desire to join in that expression but is content with the holding that we are bound by the former opinion.

We do not hold, however, that our opinion on the writ of error has the far-reaching effect contended for by the plaintiff. It must be borne in mind that the case was then before us upon a writ of error sued out by the plaintiff to review the judgment of nonsuit entered by the circuit judge in favor of the defendants Rosenbledt and Harrison and our holding was that the notice of lien which the plaintiff offered in evidence and which was rejected was sufficient in substance and should have been admitted in evidence against said defendants and that a demand made upon the skating rink company would constitute a demand upon the defendants Rosenbledt and Harrison. Our former opinion settled those two questions and nothing more. Upon the second trial in the circuit court we think the defendants were entitled to interpose any defense warranted by their pleading and not foreclosed by our former opinion. We also think that none of the questions raised or sought to be raised by them have been foreclosed by our former opinion except the sufficiency of the notice of lien and that a proper showing of demand upon the Honolulu Skating Rink, Limited, constituted a proper demand upon them. This did not preclude the defendants from taking advantage of any defect in the showing of demand made by the plaintiff or preclude them from showing as a defense that no proper demand had in fact been made upon the skating rink company. The plaintiff when first testifying as to the demand made by him stated positively that he demanded payment of the Honolulu Skating Rink, Limited, prior to filing his notice of lien and that he made no demand upon said company at any other time. Sub-

Opinion of the Court.

sequently, however, he was recalled when he stated that he had not understood the interpreter then being used to interpret his testimony and that the demand which he made upon the skating rink company was made on December 15, 1914, on the day prior to the filing of this suit. The record evidence discloses that the notice of lien was filed on December 11 and that the same was served upon the defendants Rosenbledt and Harrison on December 12. The circuit judge found that a demand was made after the filing of the lien and prior to the commencement of this suit. In order to reach this conclusion the circuit judge must have believed the last statement of the plaintiff to be the true date upon which demand was made. This decision of the circuit judge depends upon the credibility of the witness and cannot be reviewed by us. The defendants' contention that the evidence shows that the demand for payment was made before the notice of lien was filed is therefore not sustained.

But the defendants insist that the evidence shows that at the time the plaintiff demanded payment of the skating rink company and at the time he filed this suit there was nothing due him under his contract. If they are correct in this contention it is undoubtedly true that a demand made at that time was not a compliance with the statute which requires demand and refusal of "the amount due" as a condition precedent to the filing of a suit to foreclose the lien. (Sec. 2867 R. L. 1915.) It would also be true that a suit filed before anything is due would have to abate as even an action in assumpsit cannot be maintained on a demand not due at the commencement of the action. (4 Cyc. 335.) "Any matter that would constitute a good defense to an action of assumpsit on the account which is the basis of the lien is a good defense to a suit to foreclose the lien, since, if

Opinion of the Court.

nothing is due the plaintiff, he is, of course, not entitled to relief. Thus, if the account is not due when the suit was begun, there can be no recovery. And this defense may be set up by other defendants than the debtor" (Boisot on Mechanics' Liens, Sec. 579). Section 2868 R. L. 1915 is as follows:

"Whenever the work or material for which a lien is filed shall be furnished to any contractor for use as set forth in section 2863, the owner may retain from the amount payable to the contractor sufficient to cover the amount due or to become due to the person or persons who filed the lien."

Paragraph 13 of the building contract between the plaintiff and the skating rink company is as follows:

"And it is hereby mutually agreed between the parties hereto that the sum to be paid by the owner to the contractor for said work and materials shall be six thousand and four hundred & sixty three dollars & 60c—\$6463.60 subject to additions or deductions on account of alterations as hereinbefore provided, and that such sum shall be paid in current funds of the owner to the contractor in installments as follows:

"Payments to be made as follows:

"At completion and acceptance of building a payment will be made to the amount of.....\$2000.00

"Thirty days from the date of completion and acceptance\$2500.00

"Forty-five (43) days from the date of completion and acceptance\$1963.60

"It being understood that the final payment shall be made within forty-five (43) days after this contract is completely finished, provided, that in each of the said cases the architect shall certify in writing that all the work upon the performance of which the payment is to become due has been done to his satisfaction; provided further, that before such payment, if required, the contractor shall give the architect good and sufficient evidence that the premises are free from all liens and claims

Opinion of the Court.

chargeable to the said contractor and further, that if at any time there shall be any lien or claim for which if established, the owner of the said premises might be made liable, and which would be chargeable to said contractor, the owner shall have the right to retain out of any payment then due or thereafter to become due, an amount sufficient to completely indemnify him against such claim or lien, until the same shall be effectually satisfied, discharged, or cancelled. And should there prove to be any such claim after all payments are made, the contractor shall refund the owner of all moneys that the latter may be compelled to pay in discharging any lien on said premises, made obligatory in consequence of the former's default."

The original contract is before us and from an examination of the original it appears that in each instance where the number of days which must elapse after completion and acceptance before the final payment under the contract is to become due the contract as originally drawn provided that such final payment should become due forty-five days after completion and acceptance and was so stated both in writing and in figures. The figures have been changed from 45 to 43 but the written word "forty-five" has not been changed. No explanation of this discrepancy has been offered by the parties. Ordinarily the written words would govern and be accepted rather than the figures which bear evidence of having been altered without any showing as to when the alteration was made. But the defendants in their argument have accepted the changed figures as representing the true due date of the last instalment under the contract. Under these conditions we shall also accept them as correct.

From the quoted portion of the contract it will be seen that \$2000 was due upon completion and acceptance of the building; \$2500 thirty days thereafter, and \$1963.60 forty-three days thereafter. In addition to the amount

Opinion of the Court.

due or to become due under the contract there was an account for extras in the sum of \$550 which we assume became due and payable upon completion and acceptance of the building. The architect's written acceptance of the building is in evidence and bears date November 4, 1914. No other evidence bearing on the acceptance of the building was offered, but it appears from the evidence that the building was completed November 2. From these facts it follows that \$2550 became due November 4; \$2500 on December 4, and \$1963.60 on December 17. But the contract also provides that "if at any time there shall be any lien or claim for which, if established, the owner of the said premises might be made liable, and which would be chargeable to the said contractor, the owner shall have the right to retain out of any payment then due or thereafter to become due, an amount sufficient to completely indemnify him against such claim or lien, until the same shall be effectually satisfied, discharged or cancelled." Upon completion and acceptance of the building the skating rink company paid \$2470 and on December 11 Lewers & Cooke, Limited, filed a notice of lien for materials furnished the contractor in the sum of \$2586.61. The plaintiff admits the payment of the \$2470 and the defendants claim they had the right under the terms of the contract and the provision of the statute to withhold from the amount otherwise due the amount of the Lewers & Cooke claim. If defendants were justified in withholding the amount of the Lewers & Cooke claim it is clear that there was nothing due the plaintiff on December 15 when he made his demand and nothing due on December 16 when his suit was filed.

The provision of the contract relied upon by the defendants is plain and unambiguous and authorizes the owner to retain out of any payment then due or thereafter to become due an amount sufficient to indemnify

Opinion of the Court.

him against such claim or lien "until the same shall be effectually satisfied, discharged or cancelled." At the time plaintiff made the demand and filed his suit the claim of Lewers & Cooke, Limited, was on file and a suit pending to enforce it, and had not been "satisfied, discharged or cancelled." We think, therefore, that the defendants were authorized to retain such amount as would indemnify them against the claim if it were ultimately established. The claim of Lewers & Cooke, Limited, was sufficiently large to take up the unpaid balance of the first instalment and extras and the second instalment. The final payment under the contract was not then due. There was nothing due which the plaintiff was authorized to demand payment of and nothing due when the suit was filed.

As bearing upon the question whether there was anything due under the contract when the demand was made and the suit filed the plaintiff has pointed out that after this suit was filed the skating rink company paid \$545 on the account and the claim is that this payment constituted a confirmation of his claim as alleged in his complaint. We do not think the payment under the circumstances of this case had that effect. The \$545 was paid after the final instalment became due and in the absence of additional facts amounted to no more than an admission that at that time there was an amount due the plaintiff on his contract.

The decision and judgment are contrary to the law and the evidence and the exceptions thereto must therefore be sustained and it is so ordered.

A. Withington (*Robertson, Castle & Olson* on the brief) for plaintiff.

E. C. Peters and *R. J. O'Brien* (*Peters & Smith* and *R. J. O'Brien* on the brief) for defendants *Rosenbledt* and *Harrison*.

Syllabus.

IN THE MATTER OF THE PETITION OF THE TERRITORY OF HAWAII TO REGISTER AND CONFIRM ITS TITLE TO THE AHUPUAA OF KIOLOKU IN THE DISTRICT OF KAU, ISLAND AND COUNTY OF HAWAII, TERRITORY OF HAWAII.

No. 1212.

ERROR TO JUDGE OF THE LAND COURT.
HON. J. T. DeBOLT, JUDGE.

ARGUED JANUARY 28, 1920.

DECIDED MARCH 15, 1920.

COKE, C. J., KEMP AND EDINGS, JJ.

REAL ACTIONS—*statute of limitations distinguished from the common law presumption of a lost grant.*

There is a marked difference between a title acquired by prescription under the statute of limitations and a title acquired through the medium of the common law presumption of a lost grant.

SAME—*same.*

Under the statute of limitations the rule is an arbitrary one and the presumption is conclusive, whereas the common law presumption is rebuttable.

SAME—*same.*

The statute of limitations cannot be invoked against the State but where sufficient facts are shown the common law presumption of a lost grant may be indulged in and the rule will be applied as a *presumptio juris et de jure* even as against the State.

SAME—*common law presumption of a lost grant.*

Where the evidence is sufficient to apply the common law presumption of a grant it may also be assumed in the absence of circumstances repelling such conclusion that all that might lawfully have been done to perfect the legal title was in fact done and in the form prescribed by law.

Opinion of the Court.

SAME—same.

The doctrine of the common law presumption of a lost grant may be invoked in favor of the State as well as against it.

OPINION OF THE COURT BY COKE, C. J.

This cause is brought here on a writ of error sued out by the Territory of Hawaii to review numerous rulings of the judge of the land court of the Territory of Hawaii made during the trial of said cause as well as the final decision and decree made and rendered therein. There are in all twenty-five specifications of error. The controversy is in respect to what is known as the ahupuaa of Kioloku, district of Kau, Island of Hawaii. This ahupuaa contains an area of about 850 acres. In August, 1913, the Territory of Hawaii sought to have its title thereto registered. After a report by the examiner which was favorable to the claim of the Territory notice was served upon adjoining owners and possible claimants as provided by law. The Hutchinson Sugar Plantation Company (hereafter referred to as the company), the present defendant in error, was the only party appearing to make claim to the property in question. It interposed an answer denying title in the Territory and asserted ownership of the land in fee simple in itself. Trial of the issue thus joined was not commenced until October, 1918.

It is the claim of the Territory that the ahupuaa of Kioloku was not included in the great mahele of 1848 by which the lands of the Kingdom of Hawaii were supposed to have been partitioned and set apart in severalty to and between the king, the chiefs and the government, respectively, nor has the government by any subsequent award or grant conveyed away its title in said ahupuaa. The company asserts title in fee simple in itself under a mahele and land commission award which cannot now be produced and of which no present record can be found but which it claims must be presumed to have been made to

Opinion of the Court.

the high chiefess Ane Keohokalole and invokes the common law presumption of a grant and attempts to establish its claim of the existence of the grant by secondary evidence.

The facts involved in the controversy are simple. The predominant question is whether under the facts and circumstances shown to exist by the record a grant from the government to Ane Keohokalole can properly be presumed. As aptly said in the brief of the attorney general: "The whole issue of the case may be summarized in the one question, namely, under the facts and circumstances as shown in the case, will the court presume a grant of Kioloku to Ane Keohokalole?" The judge of the land court found after an able and exhaustive review of the evidence as well as of the authorities that a grant from the government to the company's predecessor in interest must be presumed and that the petitioner, the Territory of Hawaii, had no right, title nor interest whatsoever in or to Kioloku and thereupon dismissed the petition of the Territory.

At the trial before the land court it was established either by evidence or the admission of the parties that Caezar Kapaakea was the father and Ane Keohokalole the mother of David Kalakaua (afterwards King Kalakaua); that as far back as 1861 Ane Keohokalole, through her trustee C. R. Bishop, was collecting rents from the ahupuaa of Kioloku; that Ane Keohokalole died in 1869 leaving surviving her David Kalakaua and three other children; that in 1870 the lands of Ane Keohokalole were partitioned and divided between her children by a deed of partition duly executed and recorded and that by this deed the ahupuaa of Kioloku was set apart to and as the sole property of David Kalakaua; that from that date to the present time Kalakaua and his successors in interest have held actual, open, continuous and uninterrupted possession of the land in question, using it for such purposes as

Opinion of the Court.

it was adapted, and that the Hutchinson Sugar Plantation Company succeeded to the rights of Kalakaua by several mesne conveyances. The petitioner has also admitted that the land has been assessed by the several governments of Hawaii, to wit, the Monarchy, the Provisional Government, the Republic of Hawaii and the Territory of Hawaii, and the taxes so assessed have been paid by the successive occupants since 1870 to the present time.

The record herein further discloses that in 1873 David Kalakaua presented a petition to Rufus A. Lyman, boundary commissioner for the Island of Hawaii, to have the boundaries of the ahupuaa of Kioloku and other lands settled and adjudicated. It appears from the record of the boundary commissioner that the owners of adjoining lands were notified of the proceedings as required by law and that in response to this notice the then reigning monarch of Hawaii, His Majesty King Lunalilo, owner of one of the adjoining tracts of land, appeared and was represented by J. G. Hoapili, and that the government, the owner of one of the adjoining tracts of land, appeared and was represented by W. T. Martin; that testimony was taken and a judgment defining the boundaries of Kioloku by a survey description was entered; that no objection was made to the proceedings or to the findings of the commissioner either by King Lunalilo or by the government. From ancient maps and surveys of lands adjoining Kioloku and of a small kuleana located within the boundaries of Kioloku as early as 1852 Kioloku was referred to as konohiki land. Konohiki, when used as a noun, designated the person having charge of the land in behalf of the king or chief or other person to whom the ahupuaa had been assigned or awarded, but the word "konohiki" is in common use as an adjective denoting land which is privately owned in contradistinction to "aupuni" or government land. The classification of the lands in these

Opinion of the Court.

islands which has been in vogue since the great mahele of 1848 is (1) government land; (2) crown land; (3) kono-hiki land, and (4) kuleanas of the common people. In royal patent grants issued about 1860 the ahupuaa of Kioloku was referred to simply as "Kioloku" while other lands in that vicinity which it is conceded were government lands were referred to as "aupuni."

Mr. Kanakanui, a witness for the government, testified to having searched the records of the land commission and of the privy council of the former Kingdom, as well as the records of the mahele of 1848, without being able to locate any record of an award or mahele of Kioloku. And it is further shown by the Territory that Kalakaua in his petition filed with the boundary commissioner of the Island of Hawaii to have the boundaries of Kioloku and other ahupuaas adjudicated represented that no award of Kioloku had ever been made to his mother Ane Keohokalole. The petition referred to is as follows:

"To the Honorable Rufus A. Lyman,
"Commissioner of Boundaries,
"Island of Hawaii.

"The undersigned states, that A. Keohokalole had lands, She did not receive awards from the Land Commissioner to some of her lands; but she still holds said Ahupuaas to this time,

"Therefore, herewith apply to settle the boundaries of said lands, according to their names hereunder, thus

	Ahupuaas	District	Island
1.	Lililoa	Puna	Hawaii
2.	Nalua	Kau	"
3.	Kamakamaka	"	"
4.	Kapauku 5	"	"
5.	Mohokeya	"	"
6.	Kioloku	"	"
7.	Ilikahi	Kona	"

"Property owners adjoining these lands be also called

Opinion of the Court.

to appear on the day set for action on these lands, before the Land Commission,

“Applicant

(Sgd.) “D. KALAKAUA.

“Honolulu, June 23rd, 1873.”

No living witness has been produced who was present at the proceedings before the boundary commissioner and while the statement of Kalakaua in his petition was weighty evidence supporting the claim that no award of Kioloku had been issued to his mother yet the proceedings had upon the petition before the commissioner strongly refute that assumption. Kalakaua could only have presented and sustained his petition upon the hypothesis that Kioloku had been awarded by the land commissioners or patented or deeded by the king without defined boundaries and that petitioner was at that time the owner of the land, for it was prescribed in the law authorizing the proceedings, to wit, the act of the legislative assembly of the Kingdom approved June 22, 1866, that “All owners of ahupuaas and ilis of land within this Kingdom, whose lands have not been awarded by the land commissioners, patented or conveyed by deed from His Majesty the king, by boundaries decided in such award, patent or deed, are hereby required within five years from the 23d day of August, A. D., 1868, to file with the commissioner of boundaries for the circuit in which the land is situated, an application to have the boundaries of said land decided and certified to by said commissioner,” etc. (See also *Re Boundaries of Paunau*, 24 Haw. 546), and therefore great probative force must be attached to the facts that both the king and the government although being represented at the hearing before the boundary commissioner neither interposed any objection thereto and the hearing proceeded to final determination. What took place before the boundary commissioner was entirely inconsist-

Opinion of the Court.

ent with any other theory than that Kalakaua was recognized by the boundary commissioner, the king and the government as the rightful owner of the property. It is worthy of mention here that of all the lands designated in Kalakaua's petition only the boundaries of Kioloku were adjudicated. Why were not the boundaries of Lili-loa, Nalua, Kamakamaka, Kapauku 5, Mohokea and Ili-kahi also determined? The answer is not difficult in the light of the fact that these last mentioned ahupuaas are shown not to have been the property of Kalakaua. It does not seem unreasonable to assume that these facts were known at the time to the commissioner and those concerned in the proceedings had before him and hence the boundaries of only the property owned by Kalakaua were determined. For it is a fact of record that the boundary commissioner adjudicated the boundaries of Kioloku and issued his certificate thereof to Kalakaua.

The fact that Mr. Kanakanui's search has revealed the existence of no record of an award of Kioloku taken together with the recitation contained in the petition of Kalakaua constitutes the strongest circumstances in the case of the Territory. This evidence, weighty as it may seem, appears to be overcome by other facts forming a combination of circumstances which irresistibly lead to the conclusion that Kioloku had been awarded to Ane Keohokalole, namely, the facts that she was exercising dominion over this property as early as 1861; that in the partition deed of 1870 this land was set apart to Kalakaua and in 1873 the boundaries were settled upon his application with the knowledge and acquiescence of the king and the government; that from 1870 down to 1913, a period of forty-three years, the several successive governments of Hawaii recognized Kioloku as the property of Kalakaua and his successors in interest; that during this entire period no claim whatsoever was asserted by the government or by

Opinion of the Court.

any representative thereof to Kioloku, and during the whole period the property was assessed as the property of Kalakaua and his successors in interest and taxes were collected by the government down to the date of the institution of this proceeding. As said in *Jover v. Insular Government*, 221 U. S. 623, we would not be justified in assuming that the State would collect taxes on its own property.

Each party has introduced evidence supporting its theory of the case and in this respect there is some conflict in the testimony. The rule is that the findings of the trial judge will not be disturbed by review on writ of error where to do so this court would be called upon to pass upon the credibility of the witnesses or the weight of the evidence. (Sec. 2522 R. L. 1915 as amended by Act 44 S. L. 1919; *Akatsuka v. McKay*, 24 Haw. 600, 604; *Kaleiheana v. Keahipaka*, 23 Haw. 169, 171.) The evidence introduced on behalf of the company we deem to be sufficient to sustain the judge of the land court in presuming that a grant of Kioloku was issued to Ane Keohokalole the grant itself having been lost or for other reasons cannot now be produced.

We will now direct ourselves to the law involved to the end that it may be determined whether in this jurisdiction the common law presumption of a lost grant may be indulged in as against the government. This is the vital issue and presents a question of law never heretofore dealt with by the courts of these Islands.

The doctrine of presumptions, upon which this case must be solved, has called forth various definitions. The Supreme Court of the United States gives the following definition: "A presumption is an inference as to the existence of a fact not actually known arising from its usual connection with another which is known." Blackstone in speaking of the nature of evidence required to establish a

Opinion of the Court.

presumption says: "Positive proof is always required where from the nature of the case it appears it might possibly have been had. But next to positive proof, circumstantial evidence, or the doctrine of presumptions, must take its place. For when the fact itself cannot demonstratively be evinced, that which comes nearest to the proof of the fact is the proof of such circumstances as either necessarily or usually attend such facts; and these are called presumptions which are only to be relied upon until the contrary be actually proved." A presumption may be defined as the probable inference which common sense, enlightened by human knowledge and experience, draws from the connection, relation and coincidences of facts and circumstances with each other. When a fact shown in evidence necessarily accompanies the fact in issue it gives rise to a strong presumption as to the existence of the fact to be proved. But if on the other hand the fact shown in evidence only usually accompanies the fact in issue it gives rise merely to a probable presumption of the existence of the fact to be proved. And Greenleaf in his work on evidence (16th ed.), section 45, in applying the doctrine of presumption to a grant as against the sovereign, lays down the rule that "though lapse of time does not of itself furnish a conclusive legal bar to the title of the sovereign, agreeably to the maxim '*nullum tempus occurrit regi*,' yet if the adverse claim could have had a legal commencement, juries are instructed or advised to presume such commencement after many years of uninterrupted adverse possession or enjoyment;" and in a note to the section quoted it is said that application of the presumption to cases where a grant was implied against the sovereign has been made in a number of cases cited and that the same principle has been upheld in the United States in favor of individuals as against the State.

Lord Coke recognized the existence of the principle and

Opinion of the Court.

recites that an act of parliament, a grant from the crown, a deed, and in fact anything which will quiet possession may be presumed from length of time when such act, grant or deed would have been lawfully possessed, made or given, and this presumption is said to be founded on the principle that the law will not presume any man's act illegal but will attribute such possession to a legal origin; that the failure to interrupt such possession by those who had the right arose from their knowledge that it was lawful in its inception and that upon principles of public policy for quieting men in their possession. (Co. Litt. 6) In the case of the *Mayor of Kingston upon Hull v. Horner*, Cowp. 102, it was left to the jury to presume a grant or charter from the crown of certain duties.

In order, however, to properly comprehend the principle of law involved in the case at bar it must be constantly borne in mind that there is a marked distinction between a title acquired by prescription under the statute of limitations and a title acquired through the medium of the common law presumption of a lost grant or conveyance. Confusion here is the more likely to occur because under the statute of limitations title also vests upon the presumption of a grant. (*do Rago v. Halama*, 24 Haw. 750; Warvelle on Ejectment, Sec. 418.) But as pointed out in 2 C. J., Sec. 650, pp. 288, 289, under the statute of limitations the rule is an arbitrary one and the presumption is conclusive, whereas the common law presumption is rebuttable. In 1 Jones on Evidence by Horwitz, Sec. 77, it is said: "The party relying on his possession may of course call to his aid the statute of limitations where it is applicable and if he relies upon the statute the proofs must show compliance with its provisions. But the statute of limitations does not supersede the common law presumption, and if this is relied upon possession for less than a period prescribed by the statute may with other cogent circum-

Opinion of the Court.

stances sustain the claim of conveyance or a lost grant. The length of time which brings a given case within the legal presumption of a grant or charter to validate a right long enjoyed is not defined but depends upon its peculiar circumstances. It may be necessary to seek the aid of this presumption in some cases where the statute of limitations does not apply, as where it is urged against the State."

Counsel for the Territory relies largely upon the decisions of this court in *Kahoomana v. Minister of the Interior*, 3 Haw. 635, and *Thurston v. Bishop*, 7 Haw. 421. But in these two cases as well as in *Minister of the Interior v. Parke*, 4 Haw. 366 and *Kunewa v. Kaanaana*, 18 Haw. 252, this court was merely construing the principles involved in the application of the statute of limitations. In the *Kahoomana* case this court said: "The theory of titles by prescription is, that the holding possession of an estate openly and adversely for a certain length of time creates an inference that there was a grant from the adverse claimant or his ancestors or grantors, and the statute of limitations forbids the adverse claimant from setting up against this long continued possession the fact that there was no grant. But as against the government a grant cannot be presumed or inferred from long possession in view of the law which required claimants to land to present their claims to the land commission for confirmation or rejection." It is plainly to be seen that the court here was dealing with the law applicable to the statute of limitations and the common law presumption of a lost grant was not involved in the case. The same might also be said of *Thurston v. Bishop*, for it is recited in the opinion in that case, "It is admitted by the defense that no claim for this land on behalf of Lot Kamehameha was presented to the land commission according to law." Of course the presumption of a lost grant could not have been involved in the face of that admission.

Opinion of the Court.

One of the earliest American cases wherein the rule was adverted to and *Kingston upon Hull v. Horner, supra*, was quoted with approval is *Jackson v. M'Call*, 10 Johns. Rep. 376, delivered by the supreme court of New York in 1813. See also *White v. Loring*, 24 Pick. 319, decided by the supreme court of Massachusetts in 1836. The principle was considered at length by the supreme court of Vermont in *University of Vermont v. Reynolds' Ex'r.*, 3 Vt. 542. We quote from that opinion: "A great variety of cases were read at the argument, and the elementary treatises are full of them, to show that a grant or the extinguishment or surrender of a grant, and, in short, everything which will confirm a long continued possession, may be presumed; and this not because it is necessary to believe that any such acts were actually done or executed but for the purpose of quieting possession. In cases of prescription this possession is conclusive as to the right. Certain facts being found to exist the right is confirmed as a matter of law and the possession is considered as conclusive of the right, as if a deed or charter was actually produced. There are certain other cases in which the presumption is not considered as altogether a legal inference but must be made by the jury, and yet the court advise or direct the jury to make such presumption. The enjoyment of certain incorporeal hereditaments for the period of twenty years, if adverse, establishes the right to such enjoyment founded on the presumption of a lost grant; but this possession is liable to be explained. The enjoyment is therefore not an absolute title but may be rebutted. But if the enjoyment was adverse it affords sufficient ground for such presumption. Chancellor Kent says the later English authorities give to this presumption the most unshaken stability and they say it is conclusive evidence of right. Judge Story, in the case of *Tyler v. Wilkinson*, considers it in this light and says that this presumption may go to the extinguish-

Opinion of the Court.

ment of a right in various ways as well as by grant. * * *

Thus a grant of land may be presumed as well as a grant of a fishery or common or way, and many cases of this kind are to be found. * * * From comparing these cases * * * it may be inferred that where there has been a long continued possession which in its origin was or would have been unlawful unless there had been a grant; or if the origin of such possession cannot be accounted for without considering it either as unlawful or also lawful by virtue of a grant the court will not infer that the possession was unlawful but direct the jury to presume such grant or anything which will confirm the possession. But if the original possession was consistent with the fact of there having been no grant, then although the possession may have been ever so long it will be left to a jury to say whether they believe such grant has been made and they must determine according to the weight of the evidence. * * *

And where there has been a settlement and a possession for a long time, although no other grant or charter is produced under which such settlement and possession commenced, it may and ought to be presumed that the charter under which no claim had been asserted had been abandoned or surrendered and either an antecedent or subsequent grant made to the inhabitants who are in the actual occupancy of their lands." The common law presumption is one of policy as well as of convenience and necessary for the peace and security of society. (*Fletcher v. Fuller*, 120 U. S. 534.) It will be sufficient ground for the presumption to show that by legal possibility a grant might have issued, and this appearing it may be assumed in the absence of circumstances repelling such conclusion that all that might lawfully have been done to perfect the legal title was in fact done and in the form prescribed by law." *Williams v. Donell*, 2 Head 695, quoted with approval in *Fletcher v. Fuller*, *supra*. Here it may be mentioned that the presump-

Opinion of the Court.

tion may be invoked in favor of the State as well as against it. *Nelson v. Fleming*, 56 Ind. 310, 322.

The doctrine of the common law presumption of a grant as against the sovereign was dealt with at length by the Supreme Court of the United States in *United States v. Chaves*, 159 U. S. 452, and again in *United States v. Chavez*, 175 U. S. 509. In the *Chaves* case the court said: "The principle upon which this doctrine rests is one of general jurisprudence and is recognized in the Roman law and the codes founded thereon. * * * It is the general rule of American law that a grant will be presumed upon proof of an adverse, exclusive and uninterrupted possession for twenty years, and that such rule will be applied as a *presumptio juris et de jure* whenever by possibility a right may be acquired in any manner known to the law. * * * Nothing, it is true, can be claimed by prescription which owes its origin to, and can only be had by, matter of record; but lapse of time, accompanied by acts done or other circumstances, may warrant the jury in presuming a grant or title by record. Thus also, though lapse of time does not of itself furnish a conclusive bar to the title of the sovereign, agreeably to the maxim *nullum tempus occurrit regi*, yet if the adverse claim could have had a legal commencement, juries are advised or instructed to presume such commencement after many years of uninterrupted possession or enjoyment. Accordingly royal grants have been thus found by the jury, after an indefinitely long continued peaceful enjoyment accompanied by the usual acts of ownership." In the *Chavez* case two cases were covered in the one opinion, the same being cases Nos. 38 and 39. Referring to case No. 39 the court said: "The archives referred to and the documentary evidence are the same as in No. 38, except there is no grant." The opinion then proceeded to deal mainly with the principle involved in case No. 39. The land involved is situated in New Mexico

Opinion of the Court.

and the petitioner claimed ownership through the medium of a lost Mexican grant issued long prior to the cession of the territory embracing New Mexico to the United States by Mexico by virtue of the treaty of Guadalupe Hidalgo in 1848. No original grant nor any record thereof could be produced. The opinion then proceeds: "Upon a long and uninterrupted possession the law bases presumptions as sufficient for legal judgment in the absence of rebutting circumstances, as formal instruments or records of articulate testimony. Not that formal instruments or records are unnecessary, but it will be presumed that they once existed and have been lost. The inquiry then recurs, do such presumptions arise in this case and do they solve its questions? * * * We think there can be but one conclusion in this case. The possession of the land began in wrong or began in right. If in wrong it must be shown. The maxims of the law declare the other way. * * * Back to Clement Gutierrez, therefore, a continuous possession is established by admission and by testimony not contradicted. Back beyond the period of living memory and beyond that period the title needs no inquiry for its validity and repose." In *United States v. Pendell*, 185 U. S. 189, the *Chaves* and the *Chavez* cases are cited with approval, the court further saying: "The evidence is sufficient not only to presume a grant but to presume any other matter which would have occurred in order to render the grant a perfectly valid one."

The principle involved was, therefore, recognized and applied in England as early as the time of Lord Coke. It has found ingraftment into the Roman civil law. It has had the repeated sanction of the Supreme Court of the United States as well as of the state courts and at no time has it been repudiated by the courts of Hawaii. Hence it must be considered the law of the land.

We have examined all of the assignments of error and

Syllabus.

find none of them sustained by the record. The decree below is affirmed.

J. Lightfoot, First Deputy Attorney General, for plaintiff in error.

A. G. M. Robertson (*Robertson & Olson* on the brief) for defendant in error.

IN THE MATTER OF THE APPEAL OF THE
COUNTY OF HAWAII FROM A RULING OF
THE AUDITOR OF THE TERRITORY OF
HAWAII.

No. 1263.

ARGUED MARCH 18, 20, 1920.

DECIDED MARCH 24, 1920.

COKE, C. J., AND KEMP, J.

TAXATION—counties.

A county is not entitled to the general property taxes collected upon property situated in said county during a given year even though the taxes collected were levied and assessed for a former year until the Territory has received and retained the full amount which it is authorized to retain under Sec. 1299 R. L. 1915 for the purposes specified in subdivision 5 of Sec. 1236 R. L. 1915 during the year in which the collection is made.

STATUTES—construction—contemporaneous construction.

Contemporary construction and official usage for a long period by persons charged with the administration of the law are among the legitimate aids in the interpretation of statutes.

OPINION OF THE JUSTICES.

This is an appeal by the County of Hawaii from a ruling of the auditor of the Territory refusing to issue a warrant in favor of said county for the amount of

Opinion of the Justices.

certain general property taxes paid into the treasury of the Territory on February 7, 1920, by the assessor of the third taxation division, being the amount of delinquent taxes collected by said assessor upon properties situated in said county. It is made to appear by the affidavit of said assessor, and it is admitted by the auditor, that the treasurer of the Territory received on said date \$102,520.77, general property taxes collected during the month of January, 1920, of which \$66,973.14 was taxes levied and assessed for the year 1919 on property in the County of Hawaii, the collection of which had been delayed by litigation until January of this year, and \$6697.50 was costs forfeited in said litigation. The remainder of the amount received was current taxes. It is also admitted that out of the general property taxes collected in the County of Hawaii in the year 1919 the Territory has retained the full amount which it was authorized under section 1299 R. L. 1915 to retain during that year for the purposes specified in subdivision 5 of section 1236 R. L. 1915. It is the claim of the county that since the Territory has retained out of collections made in 1919 the full amount which it was authorized to retain for that year's budget, all collections of 1919 taxes, although delayed until the succeeding year, should be remitted to the county treasurer whether the amount which the Territory is authorized to retain for the 1920 budget has yet been collected out of current taxes or not. On the other hand, the auditor's claim is that since the amounts were not collected until 1920 and the collections to date, including both current taxes and delinquencies, are not in excess of the amount retainable during this year in the territorial treasury in a special account under the provisions of section 1299 R. L. 1915 for the purposes specified in subdivision 5 of section 1236 R. L. 1915 as amended by Act 177 S. L. 1919, the county is not entitled to any part thereof.

Opinion of the Justices.

So much of section 1299 R. L. 1915 as is applicable to the question follows: "Out of the property taxes * * * paid into the territorial treasury from each county or city and county the treasurer shall retain from time to time in a special account sufficient for the purposes specified in subdivision 5 of said section 1236, and shall pay the balance thereof to the treasurer of such county or city and county on the last legal day of each month" etc. Section 1236 R. L. 1915, as amended, is in part as follows: "The treasurer of the Territory shall similarly prepare and transmit to the assessor of each taxation division, an estimate of the amount, if any, payable to or retainable by the Territory out of the proceeds of this tax (general property tax) during such year in respect of such county or city and county for schools, interest, sinking fund not otherwise provided for on all territorial bonds issued for county or city and county purposes or otherwise and other purposes, including the cost of assessing and collecting taxes in such county or city and county."

The county does not contend that the first collections made in this year on account of the 1920 assessment are not retainable by the Territory up to the amount of the estimated requirements made by the territorial treasurer under subdivision 5 of section 1236. In fact it is admitted by the county attorney that the Territory has a first lien on the general property tax for the purposes specified in subdivision 5 of section 1236. It is therefore apparent that the only practical effect our decision can have is to provide either the county or the Territory with ready cash at this time. In other words, if we determine that the auditor must issue the warrant and the treasurer pay it the County of Hawaii will have the present use of that amount of money at a time of the year when the counties are notoriously short of ready

Opinion of the Justices.

money, and if we reach the opposite conclusion the territorial special account into which this money would then go will have the benefit thereof at a time when it is also likely to be low. In the end the result will be the same. For if the amount is not now retained by the Territory it will be retained out of collections made later in the year, whereas if it is now retained by the Territory the amount which it is authorized to retain during this year will be reduced by that amount. The solution of the question depends upon the two sections of the statute from which we have quoted.

The county attorney argues that by subdivision 5 of section 1236 the amount which the Territory is entitled to retain out of taxes *levied* for a given year is limited by the estimate which the treasurer makes under said subdivision for that year and since he has already retained out of the collections made in 1919 the full amount of his estimate for that year all amounts coming into the treasury as the result of the collection of delinquencies for that year must be remitted to the county. If he is correct in this contention then when a remittance is made by an assessor to the territorial treasurer which includes delinquent taxes, becoming delinquent subsequent to July 1, 1911, if the Territory has already retained out of taxes levied for the year in which the delinquency occurred the full amount which it is authorized to retain for that year the auditor must ascertain what amount included in said remittance is for such delinquent taxes and penalties and issue a warrant in favor of the county for the amount thereof.

It is argued by counsel for the auditor that section 1236, and especially subdivision 5 thereof, has no application to the question before us other than to fix the amount which the Territory is to retain out of the general property taxes *collected* during the year for which

Opinion of the Justices.

the treasurer has made his estimate and since the Territory has not yet retained out of the general property taxes collected in the County of Hawaii in 1920 the amount which it is authorized to retain under the provisions of section 1299 and the amount so authorized to be retained by it is in excess of the amount so far collected from both current taxes and delinquencies for former years it is entitled to retain the full amount claimed by the county.

Prior to July 1, 1911, the money raised by taxation was divided between the Territory and the several counties on a percentage basis, but by virtue of Act 145 S. L. 1911, which took effect July 1, 1911, the provisions which we have quoted became the law. It then became necessary for the various assessors in making remittances to the treasurer to make a report separating their collections so as to inform the auditor and treasurer what amount of each remittance was made up of delinquencies occurring prior to July 1, 1911, in order that the division of such amount might be made between the Territory and the county in which the delinquent tax was collected in accordance with the law prior to that date and the reports to the auditor and treasurer accompanying each remittance for several years following 1911 did separate the collections so as to show the amount of delinquencies occurring prior to July 1, 1911, contained in each remittance. No such separation was made as to delinquencies occurring since July 1, 1911. From the reports now made by the assessor to the auditor and treasurer when a remittance is made it is impossible to ascertain with absolute certainty how much of said remittance is current taxes and how much delinquencies unless it be a delinquency which occurred prior to July 1, 1911. It also appears from the evidence adduced before us that no distinction has ever been made by the auditor between

Opinion of the Justices.

current taxes and delinquencies occurring since July 1, 1911, it having been the practice since the present law went into effect for the Territory to retain out of the first collections made each year all general property taxes, whether current taxes or delinquencies, until the amount which it is authorized to retain for that year is fully satisfied and to remit to the counties all sums thereafter collected. It thus appears that the department having the administration of the law under consideration has for a period of about nine years construed it in accordance with the present contention of the auditor. Since this construction was first placed upon the statute in question the legislature has met several times and no amendment has been effected. The legislature is presumed to be cognizant of such construction and after long continuance without any legislation evincing its dissent courts will consider themselves warranted in adopting that construction. Contemporary construction and official usage for a long period by persons charged with the administration of the law are among the legitimate aids in the interpretation of statutes. *Macfarlane v. Collector of Customs*, 11 Haw. 166, 171; *Pasquoin v. Sanders*, 20 Haw. 352, 354; *Minister of the Interior v. Papaikou Sugar Co.*, 8 Haw. 125, 128; *Bell Telephone Co. v. Mutual Telephone Co.*, 5 Haw. 456, 460.

We think the meaning of the statute in question is sufficiently doubtful to justify us in resorting to contemporaneous official construction and in accordance with that construction we hold that the auditor was warranted in refusing to issue the warrant demanded and his ruling is therefore sustained.

W. H. Beers, County Attorney of Hawaii, for appellant.
E. C. Peters for appellee.

Syllabus.

OAHU RAILWAY & LAND COMPANY, A CORPORATION, *v.* KOLOHANA KAILI.

No. 1236.

RESERVED QUESTION FROM CIRCUIT COURT FIRST CIRCUIT.
HON. J. J. BANKS, JUDGE.

SUBMITTED MARCH 23, 1920.

DECIDED MARCH 24, 1920.

COKE, C. J., KEMP AND EDINGS, JJ.

JURY—right of trial by.

One of the parties to a cause having waived his right to a trial by jury and this waiver having been acquiesced in by the other party the status of the cause became fixed as one to be tried without a jury and this status would remain during the life of the litigation and could only be changed by consent of both parties.

NEW TRIAL—effect of order granting.

The granting of a new trial does not confer any new right but merely relegates the parties to their former status.

OPINION OF THE COURT BY COKE, C. J.

This cause comes up from the circuit court of the first judicial circuit on a reserved question. An action of ejectment was instituted by the plaintiff against the defendant and after issue was joined and within the time prescribed by law the defendant demanded in writing a trial by jury. Subsequently, and before the trial of the cause, the defendant interposed a written waiver of his right to a jury trial and the cause was tried by the circuit court without a jury. The decision was in favor of the defendant. Plaintiff thereupon carried the case to the supreme court on a bill of exceptions which was sustained and the cause was remanded to the circuit court for a new trial. When the cause came on for retrial before the circuit court the defendant interposed a motion

Opinion of the Court.

demanding a trial by jury, which motion was opposed by plaintiff. The question reserved for our consideration is whether under the facts as above outlined the defendant is now entitled to a trial by jury. Section 2379 R. L. 1915 reads: "Demand for jury. Either party to a civil suit may demand a trial by jury by a written document filed in court within ten days after the case is at issue; provided, however, that if no such demand as aforesaid shall be made for a trial by jury parties to said cause shall be deemed to have waived trial by jury."

This statute was before us for consideration and application in the case of *Trust Co. v. Cabrinha*, 24 Haw. 777, and much that is said in that opinion applies with force here. The following excerpts we think are particularly applicable: "We are satisfied that an interpretation of the statute in accordance with the legislative intent requires us to hold that the filing of a demand for a jury trial by either of the parties within the time prescribed by the statute fixes the status of the case as one to be tried by a jury. * * * It would thereafter take the same character of action by the parties to change that status as was required under the statute prior to 1909. At that time it required a waiver by both parties to change the status of the case from a jury case to a jury-waived case. So we think that where the status of the case has been fixed as a jury case by the filing of demand for a jury trial by one of the parties to the action that such status cannot be changed except by agreement of the parties or by conduct amounting to a waiver of their right to a jury trial." The defendant having waived his right to a trial by jury and the plaintiff having acquiesced therein and assented thereto the status of the case then became fixed as one to be tried without a jury and this status would remain during the entire life of the litigation unless changed by consent of both parties.

Opinion of the Court.

The defendant's position is that the waiver by him of his right to a trial by jury only related to the first trial and that upon the cause being reversed and remanded to the circuit court for a new trial his former waiver ceased to be effective and he was then entitled upon demand to a trial by jury. We can see no force in this contention. The waiver of the right to a trial by jury filed by the defendant was not temporary nor effective only during certain stages of the proceeding. It was permanent in character and is binding upon the defendant as long as the cause is at issue. The sustaining of the exceptions by the supreme court had the effect of granting a trial *de novo* before the circuit court but no new rights were thereby conferred upon the parties. They were merely relegated to their former status. See *Kearns v. Simpson*, 83 N. J. L. 221. The supreme courts of Alabama and Massachusetts, as well as the supreme court of New Jersey, in all of which States statutes similar to our own exist, have by recent opinions determined the question here presented conformably to the views above expressed. See *Brock v. Louisville & N. R. Co.*, 122 Ala. 172; *Thompson v. King*, 173 Mass. 439. See also *Tracy v. Falvey*, 92 N. Y. S. 625.

Our answer to the reserved question is that for the foregoing reasons the defendant is not now entitled to a trial by jury of the above cause.

Frear, Prosser, Anderson & Marx for plaintiff.

E. K. Aiu and Achi & Achi for defendant.

Syllabus.

TERRITORY v. SAMUEL KAUHANE, A. M. CABRINHA, WILLIAM A. TODD, EUGENE H. LYMAN, A. A. AKINA, JAMES AKO AND JULIAN YATES.

No. 1171.

**EXCEPTIONS FROM CIRCUIT COURT FOURTH CIRCUIT.
HON. C. K. QUINN, JUDGE.**

SUBMITTED JANUARY 28, 1920.

DECIDED MARCH 25, 1920.

CÔKE, C. J., KEMP AND EDINGS, JJ.

INDICTMENT AND INFORMATION—*construction.*

An indictment under section 2214 R. L. 1915 which alleges in effect that the defendants who constituted the board of supervisors of a county did incur, authorize, contract and aid in incurring, authorizing and contracting liabilities and obligations for the purposes of said county in excess of the amount of money available for the purposes of said county during the fiscal year is an indictment for having incurred liabilities in excess of the amount of money available for all county purposes and is not an indictment for having incurred liabilities in excess of the amount available in any particular account.

SAME—*same.*

An indictment should contain such a specification of the acts and descriptive circumstances as will on its face fix and determine the identity of the offense with such particularity as to enable the accused to know exactly what he has to meet.

OPINION OF THE COURT BY KEMP, J.

The defendants who constitute the board of supervisors of the County of Hawaii were convicted of having violated the provisions of section 2214 R. L. 1915, which is as follows:

“No board of supervisors or other board, committee, department, bureau, officer or employee of any county or city and county shall expend, or aid or participate in

Opinion of the Court.

expending, during any period of time for any purpose, any sum in the absence of an appropriation for such purpose for such period, or any sum in excess of an appropriation, if any, for such purpose for such period, or incur, authorize or contract, or aid or participate in incurring, authorizing or contracting, during any fiscal year, liabilities or obligations, whether payable during such fiscal year or not, for any or all purposes in excess of the amount of money available for such purposes for such county or city and county during such fiscal year, and any person who shall violate any provision of this section shall be punished," etc.

The indictment, after alleging the election and qualification of the several defendants as members of said board of supervisors and that during the fiscal year 1917 the County of Hawaii lawfully received the sum of \$550,727.36 which constituted the whole amount of money available for the purposes of the said county during the fiscal year aforesaid, further alleges in substance that during said fiscal year the board of supervisors aforesaid did actually incur, authorize, contract and aid and participate in incurring, authorizing and contracting liabilities and obligations for the purposes of said county in the sum of \$582,875.48, thereby exceeding the amount of money available for the purposes of said county for the said fiscal year in the sum of \$32,148.12.

The first question to be determined involves the construction of the indictment. The prosecution proceeded upon the theory that the indictment charges the defendants with having incurred liabilities payable out of the general account in excess of the amount of money available in that account while the defendants contend that the indictment charges them with having incurred liabilities in excess of the amount of money available for all purposes.

We have no doubt that an indictment charging the supervisors with having incurred liabilities payable out

Opinion of the Court.

of any one of the various special accounts required to be kept or payable out of the general account in excess of the amount of money available in that particular account could properly be drawn under the statute above quoted, but we also think that one of the offenses pronounced against in said statute consists of incurring liabilities in excess of the total amount of all the county funds available for all purposes. The indictment in this case makes no mention of the general account or any of the various special accounts. The allegations are in effect that the county received a certain sum of money in 1917 which was the whole amount of money available "for the purposes" of said county during that year and that the defendants during said year incurred liabilities "for the purposes" of said county in excess of the amount of money available "for the purposes" of said county for said year. If it was the intention of the prosecution to charge the defendants with having incurred liabilities payable out of any one of the special accounts or out of the general account in excess of the amount of money available in said account the indictment should have been so drawn as to apprise them of that fact. An indictment should contain such a specification of the acts and descriptive circumstances as will on its face fix and determine the identity of the offense with such particularity as to enable the accused to know exactly what he has to meet. (22 Cyc. 295.) The allegations of the indictment as to the purposes for which the liabilities were incurred being general and not confined to or made to specifically charge the incurring of liabilities payable out of the general account or any one of the special accounts we think that it charged them with having incurred liabilities in excess of the amount available for all county purposes.

The court having taken the view of the prosecution

Opinion of the Court.

that the indictment charged the defendants with having incurred liabilities payable out of the general account in excess of the money available in said account made numerous rulings upon the reception of evidence and in giving and refusing instructions to the jury which doubtless would not have been made had it construed the indictment as we have. The error into which the court fell is illustrated by defendants' exceptions Nos. 19 and 23. Exception No. 19 is to the giving of instruction No. 2 requested by the prosecution, which is as follows: "If you believe that the supervisors of the County of Hawaii in the fiscal year of 1917, did incur, authorize or contract, or aided or participated in incurring, authorizing or contracting liabilities or obligations whether payable during such fiscal year or not, for any or all purposes in excess of the amount of money available for such purposes for said county during said year, and if you further believe from the evidence that the defendants were the duly elected, qualified and acting supervisors of the County of Hawaii as alleged in said indictment, it will be your duty to find the defendants guilty as charged, even though you may further believe that the amount of such excessive liabilities or obligations was different from the amount named in the indictment." Exception No. 23 is to the refusal of the court to give instruction No. 8 requested by defendants, which is as follows: "You are further instructed that even if you should find that the defendants took part in incurring, authorizing or contracting liabilities or obligations for any particular purpose in an amount more than was available for such purpose, yet if the prosecution has failed to prove beyond a reasonable doubt that the defendants incurred, authorized or contracted liabilities or obligations for all of the purposes of the county in a larger amount than was available for all purposes, you must find the defendants not guilty."

Opinion of the Court.

Had the indictment charged the defendants with incurring liabilities for a particular purpose or payable out of any particular account in excess of the amount of money available for that purpose or payable out of that account instead of charging them with having incurred liabilities in excess of the total amount of money available for all purposes the instruction given would have been substantially correct. But under the indictment as drawn in this case the instruction given was erroneous and the one refused was correct and should have been given.

The record before us indicates that if the defendants are guilty of any offense under the statute quoted it is for having incurred liabilities payable out of the general account in excess of the amount of money available in that account and not the offense charged in the indictment. It is therefore not likely that another trial will be had on this indictment which renders it unnecessary for us to discuss other questions presented by the exceptions.

The exceptions discussed are sustained.

J. Lightfoot, Deputy Attorney General, for the Territory.

J. W. Russell and *W. H. Smith* for defendants.

Syllabus.

M. F. SCOTT AND NETTIE L. SCOTT *v.* E. N. PILIPO, ET AL., AND ESTATE OF J. B. CASTLE, KONA DEVELOPMENT COMPANY, LIMITED, AND T. KONNO.

No. 1242.

ERROR TO CIRCUIT JUDGE FIRST CIRCUIT.
HON. J. J. BANKS, JUDGE.

ARGUED MARCH 1, 1920.

DECIDED MARCH 29, 1920.

COKE, C. J., KEMP AND EDINGS, JJ.

ATTORNEY AND CLIENT—*authority of attorney.*

The acts which an attorney is authorized to do by virtue of his employment include the taking of all steps in the regular progress of litigation, including even the giving up of technical, although substantial, advantages.

SAME—*unauthorized act—waiver.*

If in the course of his employment an attorney does an unauthorized act and the client does not within a reasonable time after becoming aware of it disaffirm said act he is deemed to have waived his objection thereto.

WAIVER—*principles governing.*

Waiver is a rule of judicial policy which prevents a person from taking inconsistent positions and gaining advantages thereby through the aid of courts even though the elements of estoppel and consideration are absent.

OPINION OF THE COURT BY KEMP, J.

This is a writ of error to review a decree ordering the distribution of a certain fund among a portion of the holders of shares in the hui lands of Holualoa. In order to make understandable the proceedings had we must begin with the proceeding as the result of which the fund to be distributed was brought into court. At different times various phases of the partition suit of *Scott*

Opinion of the Court.

v. *Pilipo* involving the hui lands of Holualoa have been before this court. The present matter is an outgrowth of a collateral proceeding had therein by which C. K. Ai was required to account for rents which he had collected from a part of the property. Mr. M. F. Scott, who for many years has sponsored the proceedings had in said partition suit, after many failures finally succeeded in having Mr. C. K. Ai made a party to said partition suit and compelled to account for rents collected by him upon portions of said hui lands. The supplemental petition which Mr. Scott presented and asked leave to file purported to be in his own behalf and in behalf of all others similarly situated and when it was presented and permission asked of the circuit judge to file it Mr. W. A. Greenwell, of the firm of Castle & Withington, who appeared as attorney for Mr. J. B. Castle and the Kona Development Company, Limited, stated in open court: "I wish to state, if the court please, that we are not in sympathy; that we take no part in the proceedings in this Ai case and will not consider ourselves bound for any expenses, court expenses or attorney's expenses incurred in this matter in any way whatsoever and the attempt of Mr. Scott to prosecute this claim." At this particular time the circuit judge refused to permit Mr. Scott to file his supplemental petition but upon appeal to this court this feature of the decree was reversed (23 Haw. 625) and Mr. Scott thereafter successfully prosecuted the claim against Mr. Ai without the aid of Mr. Greenwell's clients and Mr. Ai was ordered to and did pay into court \$1210 with interest, amounting in the aggregate to \$2185.23. From the decree compelling him to account Mr. Ai appealed to this court and the decree was affirmed. (24 Haw. 277-284.) As soon as the accounting with Mr. Ai had been successfully concluded the estate of J. B. Castle (J. B. Castle

Opinion of the Court.

having since the former proceeding died), the Kona Development Company, Limited, and T. Konno, who had acquired a portion of the shares formerly held by J. B. Castle, reappeared in court by their same attorney, W. A. Greenwell, of the firm of Castle & Withington, and asserted the right and were permitted to take part in the further proceedings respecting the fund recovered as aforesaid. It appears on the record that the defendants in error combined own 73.54 shares in the hui of Holualoa. By motion Mr. Scott asked the circuit judge to fix the status of the Kona Development Company, Limited, and the estate of J. B. Castle, deceased, respecting the funds for which C. K. Ai had been ordered to account, said funds being for rents collected for use of the common property. The ground of the motion was that heretofore in open court the attorney for said Kona Development Company, Limited, and said J. B. Castle, now deceased, disclaimed all interest in said funds and refused to join in the prosecution for said accounting or to incur any liability for costs incurred in said proceedings. We do not find from the record before us that this motion was acted upon, but the matter of making the distribution was referred to a master and from proceedings had before said master it appears that some order was made on the motion, the exact nature of which is not disclosed. After a hearing before the master his report was made to the court, in which he found that the estate of J. B. Castle, T. Konno and the Kona Development Company, Limited, were jointly entitled to \$1168.30 of said fund as the owners of 73.54 shares in said hui, and that other shareholders not necessary to name were entitled to the balance. Upon the hearing of said report another motion was made by Mr. Scott to have said item of \$1168.30 stricken from the master's report. The ground of this motion was that heretofore

Opinion of the Court.

on or about April 20, 1916, when the question of whether to prosecute or not to prosecute said claim for an accounting under the supplemental petition before the court came up (said proceeding being prior to the decease of J. B. Castle) the attorney for said J. B. Castle and the Kona Development Company, Limited, by an announcement made in open court elected not to join or take any part in the prosecution of said claim under the said supplemental petition for an accounting then before the court for the reason that they regarded the liability for costs more probable than any benefits to be recovered and thereby by implication waived any claim to benefits that might be recovered. The motion was overruled and the decree, the reversal of which is sought by this writ of error, was thereupon entered approving and confirming the master's report.

The question presented is, Are the defendants in error entitled under these circumstances to participate in the distribution of said fund? It is not questioned that Mr. Greenwell during all the proceedings above recounted was the duly authorized attorney of the defendants in error and had authority to represent them in said proceedings. Neither is it contended that he was expressly instructed by his clients to take any particular action or make any particular representations therein. He possessed, therefore, such authority to bind his clients as his employment confers and no more.

In 6 C. J. p. 641 it is said: "The acts which an attorney may do by virtue of his retainer are readily divisible into two classes: (1) Those in which his authority is absolute and his action binding upon his client without regard to the latter's consent in fact; (2) those in which he is presumed to be acting in accordance with his client's instructions which are therefore *prima facie* valid, but which the client may nevertheless disaffirm. Of the first

Opinion of the Court.

class are all the steps in the regular progress of litigation, including even the giving up of technical, although substantial, advantages, such as a nonsuit. The second class is not so capable of definition, but, in general, it embraces all such acts as are customary for attorneys to do, even though collateral to the technical course of procedure, and which do not involve the sacrifice of the cause of action." If the action of the attorney in this case falls within the first division it is binding on his clients without regard to whether they gave their consent to such action or not. If it falls within the second class it is likewise binding upon his clients unless they disaffirmed his action. In speaking of the manner in which a client may ratify the act of his attorney it is said in 6 C. J. p. 670 that: "The ratification may be express or it may be implied from circumstances; whether or not the circumstances warrant the implication of ratification must of course depend upon the facts of each particular case. Any failure on the part of the client to object to an unauthorized act within a reasonable time after becoming aware of it will be construed as a ratification of it." The action of the attorney in this case occurred in April 1916 and his clients apparently acquiesced in that action. The matter then pending was for a period of more than three years before the court before they again appeared to take any action in the case and when they did appear the particular proceeding had been successfully terminated without their aid and the fund which they declined to help recover was in court for distribution. They appeared by the same attorney and claimed the right to share in the distribution of the fund. Under these circumstances we think there can be no question that if Mr. Greenwell was not authorized in the first instance to take the action which he did take his action in that respect has since been

Opinion of the Court.

ratified by the conduct of his clients. If then the statement made by Mr. Greenwell in open court amounted to a waiver of the rights of his clients they are bound thereby.

The question of whether or not a given state of facts brings the case within principles of the law of waiver is not always an easy one to determine. In *Pabst Brewing Co. v. Milwaukee*, 126 Wis. 110, 116, a statement of the principles which should govern in such cases, and which meets with our approval, is as follows: "It would seem that the more satisfactory ground on which to support the doctrine of waiver is that it is a rule of judicial policy, the legal outgrowth of judicial abhorrence, so to speak, of a person's taking inconsistent positions and gaining advantages thereby through the aid of courts,—a rule by which, regardless of absence of any element of estoppel or consideration as those terms are popularly understood, the maxim that one shall not be permitted to blow hot, then with advantage to himself turn and blow cold, within limits sanctioned by long experience as required for the due administration of justice, has been prohibitively applied. It is applied where one with knowledge of the facts voluntarily pays a demand upon him. It is applied when one with knowledge, or reasonable means of knowledge, of the facts having two inconsistent remedies chooses one of them. It is applied where one without objection and with such knowledge, or means of knowledge, receives property in consummation of an executory contract. The tendency of courts is to consider as within one of the exceptional classes any situation which is within the principle of it, both as regards the mere fact of waiver and the importance in the administration of justice of holding the waivee to the position he voluntarily and with knowledge has elected to take."

From the facts in this case it seems to us that the de-

Syllabus.

fendants in error at the time when the question of whether or not they would join Mr. Scott in his effort to compel C. K. Ai to account for rents made their choice of the course they would pursue, no doubt deeming that course the most advantageous to them. It would now be, in our opinion, entirely out of harmony with the principles which should govern the administration of justice to permit them to abandon the position they at that time voluntarily and with knowledge of the facts elected to take.

The decree permitting the defendants in error to participate in the distribution of the fund is erroneous and must be reversed and it is so ordered and the cause is remanded for further proceedings consistent with this opinion.

M. F. Scott for plaintiffs in error.

W. A. Greenwell (*Robertson, Castle & Olson* on the brief) for defendants in error.

H. AKONA *v.* ANA KALUAI, SOMETIMES KNOWN
AS AND CALLED ANA KAPANA.

No. 1243.

EXCEPTIONS FROM CIRCUIT COURT FIRST CIRCUIT.

HON. J. J. BANKS, JUDGE.

SUBMITTED MARCH 1, 1920.

DECIDED MARCH 29, 1920.

COKE, C. J., KEMP AND EDINGS, JJ.

EVIDENCE—*marriage*.

Any evidence which is admissible, in those jurisdictions which recognize a common law marriage as valid, to corroborate the evi-

Opinion of the Court.

dence of such marriage is also admissible to corroborate the evidence of a ceremonial or statutory marriage.

SAME—*same*.

A marriage record kept by a priest and produced from the custody of his successor who is custodian of the record is admissible without proving that the entry was made by the priest who performed the marriage ceremony.

SAME—*cross-examination*.

Where one is given wide latitude in an attempt to test the memory of a witness it is proper for the court to exercise a sound discretion in excluding further cross-examination for that purpose.

OPINION OF THE COURT BY KEMP, J.

This is an action of ejectment. The appellee was plaintiff below and the appellant was defendant. Judgment was for the plaintiff and the defendant brings exceptions. It is admitted that W. Kapana at the time of his death on May 3, 1917, was the owner and in possession of the land in controversy. The plaintiff claimed the land under a deed from Emilia Kapana who claimed to be the widow and sole heir at law of said W. Kapana, deceased. The defendant's claim is that she and not the plaintiff's grantor is the widow and sole heir at law of said W. Kapana, deceased.

The circuit judge found that W. Kapana was at one time known as Keonikio Kapana and that he and Emilia W. Kapana were married in or about 1876; that subsequently in the year 1895 the said W. Kapana went through a marriage ceremony with the defendant but that at the time of this marriage the said W. Kapana was not legally divorced from his wife Emilia and that his subsequent marriage with the defendant was and is invalid owing to the existence of the prior valid marriage, and that the marriage between W. Kapana and Emilia existed at the time of his death. These findings of the circuit judge are amply supported by the evidence adduced at the trial and unless the court considered ille-

Opinion of the Court.

gal evidence or excluded legal evidence from which a different conclusion might be reached the decision and judgment based thereon should not be disturbed.

The exceptions presented relate principally to the reception of evidence which the defendant claims should have been excluded. Exceptions 1 and 2 complain of the overruling of her objection to the evidence of Malie Sniffen to the effect that Emilia and W. Kapana lived at her house about three years as husband and wife and that said Kapana stated to the witness that Emilia Kapana was his wife. And exception No. 3 is to the admission in evidence over her objection of a deed by W. Kapana to Mrs. Sniffen in which Emilia Kapana joined for the purpose of releasing her dower.

The argument of defendant is that as the plaintiff was relying upon a ceremonial marriage such evidence was irrelevant and incompetent.

In jurisdictions which hold that a common law marriage is valid, to constitute such a marriage there must be an agreement to become husband and wife immediately from the time when the mutual consent is given and if such an agreement is shown it is no more necessary to prove cohabitation or reputation than in the case of a ceremonial marriage, but in either case it is competent for the party seeking to establish the marriage to show for the purpose of corroborating the evidence of marriage that the parties lived together as husband and wife; that they or either of them admitted or otherwise declared that the marriage exists. On the other hand, if the parties or either of them have denied a marriage or admitted that none existed or otherwise made declarations repugnant to the existence of a marriage these statements may be considered as tending to disprove a marriage. (18 R. C. L. 392; 26 Cyc. 886.) The evidence was therefore properly received to corroborate the evidence of a ceremonial marriage.

Opinion of the Court.

The fourth exception is to the introduction in evidence of the marriage record book of the Catholic church at Halawa, Kohala, Hawaii, showing the marriage of Keonikio Kapana and Emilia. This was objected to on the ground that the first name or initial of the Kapana named in the record as having married is not the same as the Kapana who is the common source of title. As we have already stated the circuit judge found as a fact that W. Kapana was formerly known as Keonikio Kapana and that finding is supported by the evidence. The further objection to this evidence was that it was not shown that the entry of marriage was made at or about the time of the alleged marriage, or by Father Fabeano or a person authorized to make the entry. The book containing the marriage entry was produced by Father Theodose, the Catholic priest in charge of the church at Halawa and shown to be the legal custodian of the records of the church. The marriage record was required by law to be kept (Sec. 2912 R. L. 1915) and was competent evidence under these circumstances without proof that the entry was made by the priest who performed the marriage ceremony. *Rep. v. Waipa*, 10 Haw. 442.

The fifth, seventh and ninth exceptions have not been mentioned in appellant's brief and must therefore be regarded as abandoned.

Exception No. 6 goes to the overruling by the court of an objection by defendant to a question propounded by the plaintiff to a witness as to whether Kapana had the reputation of being a married man when he first knew him at Kawaihae. The answer of the witness being "no" the defendant cannot complain even if the ruling was erroneous.

Exception No. 8 is to the sustaining of plaintiff's objection to a question propounded to the witness Emilia Kamekona Kapoi on cross-examination as follows: "Do

Opinion of the Court.

you know when Queen Liliuokalani died?" Counsel contend that as the witness had theretofore testified that she was married to W. Kapana in 1876 the question was proper to test the witness' memory. They were given wide latitude in the cross-examination of this witness and many questions were asked for the same general purpose of testing her memory and the questions allowed. It was not shown that the witness knew the Queen or had any knowledge of the date of her death. Under these circumstances the court was justified in exercising its discretion to limit the cross-examination by sustaining the objection to this question.

The tenth and final exception is to cross-examination of the defendant as to whether or not Mr. E. A. Mott-Smith informed her that the present plaintiff had through his attorney demanded possession of the land in controversy. The defendant had testified that until the papers in this case were served upon her she had no knowledge that any other person claimed to own the land. The questions objected to were designed to lay the foundation for impeaching her on this point. She denied that Mr. Mott-Smith even told her that such demand was made on him. Mr. Mott-Smith's testimony did not directly contradict this statement — his remembrance being that he communicated the information as to the demand for possession to Mr. Ulukou who was acting as defendant's agent but he had no remembrance of having told the defendant. The whole matter was probably immaterial and could have been properly excluded on that ground but as the matter finally showed up in the testimony the defendant's statement was not contradicted and she could not have been prejudiced thereby.

Finding no merit in the exceptions the same are overruled.

Watson & Clemons for plaintiff.

Andreus & Pittman for defendant.

Syllabus.

FRANCES L. PARKE v. JANE S. PARKE, ANNIE H. PARKE, BERNICE P. WALBRIDGE AND HAWAIIAN TRUST COMPANY, LIMITED, AN HAWAIIAN CORPORATION, AS ADMINISTRATOR OF THE ESTATE OF WILLIAM C. PARKE, DECEASED.

No. 1177.

APPEAL FROM CIRCUIT JUDGE FIRST CIRCUIT.

HON. C. W. ASHFORD, JUDGE.

ARGUED FEBRUARY 24, 1920.

DECIDED APRIL 6, 1920.

COKE, C. J., KEMP AND EDINGS, JJ.

MARRIAGE—*license*.

It is provided in section 2905 R. L. 1915 (Sec. 1870 Civ. L. 1897) that "it shall in no case be lawful for any persons to marry in this Territory without a license for that purpose duly obtained from an agent duly appointed to grant licenses to marry in the judicial district in which the marriage is to be celebrated." This provision while clearly prohibitory contains no words of nullity.

SAME—*same*.

Section 8 R. L. 1915 (Sec. 8, Civ. L. 1897), which reads: "Whatever is done in contravention of a prohibitory law is void although the nullity be not formally directed," expressly renders null whatever is done in contravention of a prohibitory law. These two sections must be considered in *pari materia*.

SAME—*same*.

A license is a prerequisite to a valid marriage in this Territory. Marriages *per verba de praesenti*, as recognized by the common law, are void here. *Godfrey v. Rowland*, 16 Haw. 377, holding to the contrary, overruled.

OPINION OF THE COURT BY COKE, C. J.

This is an appeal prosecuted by complainant-appellant from a decree of the circuit court of the first judicial cir-

Opinion of the Court.

cuit sitting in equity dismissing her bill of complaint. A summarized history of the controversy is as follows: William C. Parke, a resident of Honolulu, died intestate on November 17, 1917, leaving an estate in the Territory of Hawaii consisting of real and personal property of the approximate value of \$250,000. Following his death and upon the petition of his sisters, the respondents Jane S. Parke, Annie H. Parke and Bernice P. Walbridge, and who claim to be his heirs, the respondent Hawaiian Trust Company, Limited, a corporation, was by the probate court of the first judicial circuit duly appointed administrator of said estate. In July 1918 the administrator filed its final accounts together with a petition for the approval thereof and for an order of distribution. The appellant, who styles herself Frances L. Parke, filed in the proceeding in probate a petition alleging that she was at the time of the death of William C. Parke his lawful wife and one of his heirs at law and as such was entitled to one-half of his estate. The respondents interposed pleas to the petition alleging that the three above-named sisters of William C. Parke are the sole and only heirs at law of decedent, denying that petitioner was his wife and setting up a release claimed to have been executed by the appellant under the name of Fannie Kunewa on January 26, 1918, whereby she had forever discharged the estate of William C. Parke and his executors, administrators and heirs of and from all manner of actions, suits or demands in law and in equity which she might have had against the estate of William C. Parke or his representatives. The release reads as follows: "Know all Men by these Presents: That for and in consideration of certain payments of money made and to be made to me by William L. Whitney, trustee, of Honolulu, Territory of Hawaii, I, Fannie Kunewa, of said Honolulu, do hereby remise, release and forever discharge the estate of Will-

Opinion of the Court.

iam C. Parke, deceased, his executors, administrators, heirs and assigns of and from all manner of actions, suits or demands in law or in equity, which against the said estate of William C. Parke, his administrators, heirs or assigns I have had, now have, or which my heirs, executors, administrators or assigns or any of them, can, shall or may have by reason of any matter, cause or thing whatsoever. In Witness Whereof I have hereunto set my hand this 26th day of January, 1919. (Sgd) Fannie Kunewa. Witness to Signature (Sgd.) Wm. L. Whitney."

This release constituting a bar to petitioner's claim in the probate court she filed her bill in equity in the circuit court to have the respondents enjoined from using said release and for a cancellation thereof. The averments of the bill in equity set forth that the complainant (appellant herein) became the lawful wife of William C. Parke on the 13th day of November, 1912, and that she thereafter lived with him as his wife until the date of his death, November 17, 1917, and as such wife she is entitled to a distributive share of the estate; that complainant signed the purported release at the instance of Wm. L. Whitney not knowing the contents thereof and under a misapprehension of the effect thereof; that at the time of the execution of the release she was in ill health; that she was confused and that she understood that she was merely signing a receipt for temporary maintenance and had no thought or intention that the document was in fact a settlement of, or in any way affected, her dower right in the estate. The respondents joined issue and voluminous testimony was introduced at the trial.

It is not claimed by the appellant that any license to marry was first obtained or that there was a marriage celebrated by the publication of bans or a public wedding of any nature, but she insists that she and William C. Parke by mutual consent and agreement took each other

Opinion of the Court.

per verba de praesenti as husband and wife on the 13th day of November, 1912, and lived together as such until his death. In other words, it is contended by the appellant that her marriage to Parke was a common law marriage as distinguished from a statutory marriage which prescribes that a license to marry must first be obtained and contemplates a ceremony conducted by a person duly authorized to perform marriages in this Territory. It is admitted that there are no children as the issue of this alleged marriage.

The judge of the court below in an opinion which admirably and adequately reviewed the law and the evidence found that the relations existing between appellant and Parke were meretricious rather than matrimonial; that there was neither a common law marriage nor any marriage existing between the parties; and further found that appellant at the time she signed the release in question had no claim of any legal character against the estate of William C. Parke; that at the time she was not under misapprehension or duress nor was there any other circumstance which might warrant a revocation of the release.

It was argued in the court below by counsel for appellees that a common law marriage is not valid in this Territory. But the trial judge having before him the opinion of this court rendered in *Godfrey v. Rowland*, 16 Haw. 377, where the validity of a common law marriage in Hawaii is upheld he properly deemed himself to be bound by that opinion. Counsel again present the same argument here.

We of course labor under no such limitation as circumscribed the actions of the circuit judge but out of regard for the certainty and stability of the law this court would be loath to set aside one of its former decisions and especially where to do so property rights and per-

Opinion of the Court.

sonal relations might be disturbed. We think, however, that slight, if any, hardship would follow as a result of our refusal to acquiesce in the decision laid down in the *Godfrey-Rowland* case. If that decision is wrong it should be overruled at this time so that the public may not any longer be misled by it. It is generally better to establish a new rule than to follow a bad precedent. We therefore conclude that we owe it to the community as well as to these litigants to review the *Godfrey-Rowland* opinion and to repudiate it if in our opinion it is unsound.

The *Godfrey-Rowland* case was an action of ejectment wherein it became necessary for the plaintiff to prove that Thomas Metcalf was the legitimate son of Frank Metcalf and hence that his parents were lawfully married. The court was construing the provisions of section 1870 Civ. L. 1897. That section, with amendments which are immaterial to this opinion, is the same as section 2905 R. L. 1915, which reads as follows: "In order to make valid the marriage contract, it shall be necessary that the respective parties be not related to each other nearer than in the fourth degree of consanguinity; that the male at the time of contracting the marriage shall be at least eighteen years of age, and the female at least fifteen years of age; that the man shall not at the time have any lawful wife living and that the woman shall not at the time have any lawful husband living; and it shall in no case be lawful for any persons to marry in this Territory without a license for that purpose duly obtained from the agent duly appointed to grant licenses to marry in the judicial district in which the marriage is to be celebrated." The court then proceeded to make use of the following language: "Section 1870 is mandatory as to its provisions except that relating to a license. That provision must be held to be simply directory. By the

Opinion of the Court.

universal rule of construction applied to statutes regulating marriage, wherever it is possible to do so, the provisions must be held to be directory and not mandatory. They are held mandatory only when accompanied by provisions of nullity; if it is provided that upon the failure to perform certain steps made essential to the validity of a marriage such marriage shall be null and void, the provision is held mandatory, but not otherwise. All of the provisions of section 1870, except that in respect to licenses, are framed in language mandatory in nature." And on a motion for a rehearing of the case (16 Haw. 505) the court said: "The court held that the statutory provisions concerning marriage referred to in the defendant's motion were mandatory, except that relating to a license, which it held to be directory. This necessarily meant, and it was after due deliberation intended to mean, that persons could be legally married in contemplation of this article (Sections 1875 C. L., 1289 C. C.) who had not a marriage license. Distinction is made between those things which the statute declares shall be necessary 'in order to make valid the marriage contract,' and the provision that 'it shall in no case be lawful for any person to marry without a license,' between a legal or valid marriage and one which is not in conformity with directory requirements of the statute."

If section 2905 R. L. 1915 could properly have been considered entirely without relation to any other contemporaneous statute we would be inclined to agree, as held in the *Godfrey-Rowland* opinion, that the provision relating to a license is merely directory because unaccompanied by any provisions of nullity. But there existed at that time a statute which must have been overlooked by the justices of the supreme court when engaged in formulating that opinion, that is, section 8 of chapter 3 R. L. 1915, which is to be found under the heading

Opinion of the Court.

“Operation of Laws,” and which reads as follows: “Section 8. Prohibitory. Whatever is done in contravention of a prohibitory law is void, although the nullity be not formally directed.” Laws upon the same subject are construed with reference to each other and it thus becomes necessary to consider these two statutes in *pari materia*. It is provided in section 2905 that “it shall in no case be lawful for any persons to marry in this Territory without a license for that purpose duly obtained from an agent duly appointed to grant licenses to marry in the judicial district in which the marriage is to be celebrated.” Here we have a law which is clearly prohibitory but which within itself contains no words of nullity. Section 8, however, supplies this deficiency and expressly renders null and void whatever is done in contravention of a prohibitory law. A prohibitory law is defined as “one which forbids all actions which disturb the public repose, or injury to private rights, or crimes or misdemeanors, or certain actions in relation to the transmission of estates, the capacity of persons, or their objects” (26 A. & E. Enc. L. 533). Neither in the opinion nor in the entire record in the *Godfrey-Rowland* case is section 8 mentioned, and we must therefore conclude that had the court been aware of its existence the *Godfrey-Rowland* opinion would not have been rendered. In the very earliest laws enacted in these islands there is plainly expressed a determined effort to protect morality and the social order as well as the rights of property by requiring a marriage license as a prerequisite to the right to marry and providing penal consequences for a violation of that requirement. In section 11, chapter 10, Laws 1842 (see Fundamental Law of Hawaii), it is provided that “Those who desire to be united in wedlock shall first go to the governor or to his agent, and obtain a written assent to their marriage, and then it shall be proper for

Opinion of the Court.

the priest to solemnize the marriage." And in section 12 it is provided: "If any one disregard * * * the XI section of this law, or if any one shall unite persons in marriage in a manner at variance with any part of this law, he shall be fined one hundred dollars." These enactments clearly demonstrate an early determination on the part of the law-makers in these Islands to add vitality to the loose and doubtful marriage system which had grown up under the common law and to make of marriage a homogeneous, staple and certain institution. It is true the statutes of 1842 were merely penal and contained no words of nullity but when at a later date sections 8 and 2905 were enacted this defect was provided for.

Prior to 1844 contracts to marry *per verba de praesenti* were recognized as valid in England but in that year the doctrine was repudiated and down to the present date marriages are valid only if solemnized according to the marriage act of the realm. Among the United States there is an astonishing lack of uniformity in the laws on this subject. In some of the states common law marriages are still recognized while in others the reverse is true. The modern tendency, however, is to recognize marriage as something more than a civil contract for it creates a social status or relation between the contracting parties in which not only they but the state as well are interested and involves a personal union of those participating in it of a character unknown to any other human relation and having more to do with the morals and civilization of the people than any other institution. For these reasons there is a gradual tendency to protect the parties as well as society by reasonable requirements unknown to the common law but which at the same time are not burdensome nor calculated to discourage marriage among those who ought to assume that relation.

Opinion of the Court.

We are mindful that a former unanimous opinion by the justices of this court should not be lightly overturned but here we are confronted with an occasion where a departure from a former decision which has become a precedent is rendered necessary in order to vindicate plain and obvious principles of law. We are therefore compelled to overrule that part of the *Godfrey-Rowland* opinion which holds that a marriage in this Territory is valid notwithstanding no license to marry is first obtained by the parties. This conclusion disposes of the case adversely to the appellant.

But while this opinion is devoted mainly to a discussion and determination of a question which was not available to the trial judge yet it must not be inferred that we disagree with his decision or conclusions. He found as a matter of fact, and was amply sustained by the evidence and we concur therein, that the relations between the appellant and Parke were entirely illicit; that there was no marriage between them, either common law, statutory or otherwise. This necessitated the dismissal of appellant's bill as the relief she sought could avail her nothing.

The decree appealed from is affirmed.

W. B. Pittman (*Andrews & Pittman* on the brief) for complainant.

A. G. M. Robertson and *W. F. Frear* (*Frear, Prosser, Anderson & Marx* and *Robertson & Olson* on the brief) for respondents.

Syllabus.

IN THE MATTER OF THE APPEAL OF AMOS KOKI
FROM A RULING OF THE AUDITOR OF THE
TERRITORY OF HAWAII.

No. 1210.

TRIED MARCH 16, 1920.

DECIDED APRIL 6, 1920.

COKE, C. J., KEMP AND EDINGS, JJ.

TERRITORIES—*limitation on legislative power.*

An appropriation of money by the legislature to pay to a defaulting homesteader any sum in excess of the value of his improvements as legally ascertained would amount to a gift or gratuity and is void.

PAYMENT—*fund from which payment is made not material.*

A payment by the Territory to one for whose benefit the legislature has made an appropriation, although not paid out of the fund contemplated by the appropriating act, will nevertheless be applied as a credit upon the amount appropriated when it appears that the payment was made on account of the claim for which the appropriation was made.

OPINION OF THE JUSTICES.

This is an appeal to the justices under section 1406 R. L. 1915 by Amos Koki from a decision and ruling of the auditor of the Territory of Hawaii refusing to issue a warrant on the treasurer of the Territory of Hawaii to the appellant in the sum of \$573 as demanded by him. The appellant was the holder of special homestead agreement No. 1037, lot 113 of the Puukapu homesteads, Wai-mea, Kohala, Hawaii, which was duly canceled because of failure on the part of appellant to comply with the terms and conditions thereof. After the cancelation of said homestead agreement the sub-land agent for the land district acting by himself, and without the assistance of another appraiser as required by section 414 R. L. 1915, appraised the permanent improvements on said homestead

Opinion of the Justices.

as being of the value of \$551. The land covered by said homestead agreement No. 1037 was subsequently allotted to a succeeding homesteader, who, as required by law, paid to the commissioner of public lands the sum of \$551. Subsequently, the error in the method of appraisement having been discovered, a reappraisement was made by two appraisers as required by law and the value of the permanent improvements placed on said homestead by appellant was fixed at \$573. The succeeding homesteader having been put in possession of the premises was required to pay only the amount of the first appraisement or \$551, and the Territory having no funds with which to pay to appellant a greater sum than \$551 was unable to pay the amount found by the second appraisement. Thereafter the legislature of the Territory of Hawaii at its 1919 session by section 2 of Act 231, appropriated \$573 to be paid out of any money in the treasury of the Territory of Hawaii "to pay in full the claim of Amos Koki of Waimea, County of Hawaii, for amount paid, upon adjustment of the value of the improvements put on the premises by said Amos Koki on lot 113, Puukapu homesteads, second series, Waimea, Kohala, Hawaii." Section 3 of said act provides that the auditor shall not issue warrants in payment of the above amounts unless receipts in full are filed therefor and the same are approved by the commissioner of public lands. Since the enactment of the above section the treasurer of the Territory has paid to the appellant the sum of \$551. This payment was made upon a warrant drawn by the auditor against "Special Accounts" and designated "Improvements on Lands" and has attached thereto the requisition of the commissioner of public lands. The purpose of the payment is shown by the requisition, the body of which is as follows: "To Amt. on deposit for improvements Lot 113 Puukapu Hmstds., formerly held by Amos Koki

Opinion of the Justices.

under S. H. A. 1037 same being paid in by Joseph Pai present occupier under S. H. A. 1473.....\$551.00” At the time of this payment the appellant executed a receipt, which, omitting formal parts, is as follows: “I hereby acknowledge receipt of the sum of Five Hundred Fifty One Dollars (\$551) for improvements on homestead lot at Puukapu, South Kohala, Hawaii, and hereby agree that the payment of this sum in no way affects the question of the amount due me from the Territory as set forth in section 2 of Act 231 of the Session Laws of 1919.”

The appellant now demands in addition to the \$551 so paid to him the further sum of \$573 appropriated by said Act 231. It is the contention of the auditor “That if the appropriation made by the legislature of the Territory of Hawaii as set forth in said section 2 of Act 231, shall be regarded as an appropriation by the legislature to pay to Amos Koki a sum in addition to that which was fixed by the said appraisers pursuant to law, then said appropriation by the said legislature was illegal and invalid as being a gratuity or gift and beyond the legislative power of the territorial legislature,” and “that if the said appropriation as set forth in said act shall be regarded as an attempt on the part of the legislature to appropriate for the benefit of the said Amos Koki as an outgoing homesteader, a sum in addition to that which is provided for by the land laws of the Territory of Hawaii, then such attempted legislation on the part of the territorial legislature was illegal and void and beyond the legislative power of the territorial legislature.”

Section 414 R. L. 1915 provides *inter alia* that in case a homestead lease is surrendered, forfeited or escheats to the government, if such premises are held open for settlement the unimproved value thereof and the value of the permanent improvements thereon shall be appraised separately. The appraisement shall be made by a board

Opinion of the Justices.

consisting of the sub-agent and another person to be appointed by the commissioner. If the premises shall be disposed of under the provisions relating to homestead leases or right of purchase leases the new tenant shall pay for such permanent improvements in cash upon receiving his certificate of occupation or lease. Section 427 R. L. 1915 provides for payment of the amount received from the incoming tenant as provided in section 414 to the surrendering tenant or freeholder who has forfeited or surrendered his lease or freehold to the government.

Assuming, as have the parties hereto, that the provisions of the statute apply to special homestead agreements at least a moral obligation was placed upon the Territory to have the permanent improvements on the forfeited premises appraised and to collect from the incoming tenant the amount of the appraised value of such improvements and to pay such amount when so received over to the surrendering lessee or freeholder. These provisions were a part of the land act of 1895 and were by section 73 of the Organic Act continued in force until Congress shall otherwise provide. Congress has not otherwise provided so these provisions of the law remain a part of the Organic Act of the Territory which cannot be changed or modified by the legislature. But for these provisions of the statute there would be no obligation upon the Territory to see that the appellant was paid anything for the improvements placed by him upon the homestead which he by his failure to comply with the terms of his agreement permitted to be forfeited to the government. The limit of the obligation placed upon the Territory by the statute is to see that he receives for said improvements their appraised value, and that the appraisal is made in accordance with the provisions of said statute. The reappraisal was made in accordance with the statute and the valuation was fixed at \$573.

Opinion of the Justices.

Any appropriation by the legislature which has the purpose of giving to the appellant out of the money raised by taxation any sum in excess of the value of said improvement as legally ascertained would amount to a gift or gratuity and would be void. It is fundamental that it is beyond the power of the legislature to authorize the expenditure of money raised by taxation by way of gift or gratuity to individuals in the absence of, at least, a moral obligation to support the appropriation. *In re Cummins*, 20 Haw. 518-529 and cases cited.

If, as has been argued, the value of the improvements was greatly in excess of \$573, as legally ascertained, still there is no obligation either legal or moral upon the public to make up out of its funds the loss to the appellant occasioned solely by his own default. Appellant's homestead agreement was canceled for failure on his part to comply with the conditions thereof. If the legislature has the right under these conditions to inquire into the correctness of the appraisement when legally made and appropriate public moneys to pay to defaulting homesteaders the amount which it finds to be the value of such improvements then every homesteader who permits his homestead to be forfeited for noncompliance with his agreement or for any other reason would be authorized to go before the legislature and have his claim reexamined and have the public make good the loss occasioned by his own default. The power of ascertaining the value of improvements placed upon a homestead which has been forfeited has been lodged by Congress in the executive branch of the territorial government and it is beyond the power of the legislature to reexamine what has been legally done by the executive.

We think that the action of the auditor in refusing to issue the warrant in question must be upheld on another theory as well as the one we have discussed. From

Opinion of the Justices.

the wording of the act it appears that the appropriation of \$573 was to "pay in full" the claim of Amos Koki, etc. Since the act was passed the Territory has paid him \$551. True it was paid out of a special account and the receipt executed by appellant provided that this payment should in no way affect his rights under the appropriation. The payment was made, however, by the territorial treasurer upon a warrant drawn by the auditor in compliance with the requisition of the commissioner of public lands. The money paid to him was territorial money as much as any other money in the territorial treasury and the fact that payment was made out of a fund not contemplated by the appropriating act should not prevent the payment from applying on the amount which the legislature said was for "payment in full" of his claim. It appears from the opinion of the attorney general of the Territory delivered to the commissioner of public lands and attached to the return of the auditor as an exhibit that when the claim of appellant was presented to the legislature the senate by resolution required the commissioner of public lands to have his improvements reappraised and that pursuant to said resolution the reappraisement was made and their value determined to be \$573. This fact is not controverted by appellant. In view of this action it is significant that the appropriation was for the exact amount of the reappraisement. It seems to us to be conclusive that the legislature respected the reappraisement, as it was bound to do, and did not intend that appellant should receive the \$551 and in addition thereto receive the \$573 appropriated.

It has been argued that the \$551 paid to appellant was not territorial money and for that reason cannot be considered as a payment on account of the appropriation. We do not agree that it was not territorial money. If

Opinion of the Justices.

not used for the purpose for which it was collected it would remain in the territorial treasury subject to disposal by the legislature.

We conclude that if the act should be construed as an attempt of the legislature to appropriate for the benefit of appellant any sum in excess of the legally appraised value of his improvements it was and is beyond the power of the legislature to enact. For that reason and from the plain import of the act itself we think the intention of the legislature was that appellant should receive from the Territory the value of the improvements as fixed by the reappraisement and no more.

The auditor in his return has expressed his willingness to issue a warrant for \$22, the difference between the amount already paid and the appropriation. This is all that appellant is entitled to at this time.

The decision and ruling of the auditor declining to issue a warrant for \$573 is therefore sustained but if necessary an order will be made directing the auditor to issue a warrant for \$22 when the provisions of section 3 of said Act 231 have been complied with.

H. L. Grace for appellant.

J. Lightfoot, Deputy Attorney General, for appellee.

Opinion of the Court.

WONG WONG v. HONOLULU SKATING RINK, LIMITED, A CORPORATION, MORRIS ROSENBL EDT AND FRED HARRISON.

No. 1187.

MOTION TO AMEND DECISION.

ARGUED APRIL 8, 1920.

DECIDED APRIL 8, 1920.

COKE, C. J., KEMP, J., AND CIRCUIT JUDGE DEBOLT IN PLACE OF EDINGS, J., DISQUALIFIED.

Per Curiam: The appellants Rosenbledt and Harrison have filed a motion to have the decision rendered and filed herein on March 1, 1920, amended by adding thereto an order sustaining their exception No. 25 to the denial by the court below of their motion for a nonsuit and adding a direction to the trial court to grant said motion for a nonsuit. One of the grounds of appellants' motion for a nonsuit in the court below was in effect that the plaintiff had failed to prove that there remained anything due and unpaid on the contract sued upon. In our decision which they ask to have amended we held that there was nothing due on said contract when the suit was filed and ordered the exceptions to the decision and judgment as contrary to the law and the evidence sustained. This holding we think necessarily sustains appellants' exception No. 25 to the overruling of their motion for a nonsuit, but in order that there may be no uncertainty or doubt in respect thereto the motion to amend the decision is granted and the decision is ordered amended so as to include the sustaining of appellants' exception No. 25 to the denial by the court of their motion for a nonsuit.

E. C. Peters for the motion.

A. Withington contra.

Syllabus.

IN THE MATTER OF THE APPLICATION OF NE-
VENCIO GAMAYA FOR A WRIT OF HABEAS
CORPUS.

No. 1268.

ORIGINAL.

ARGUED APRIL 6, 1920.

DECIDED APRIL 12, 1920.

COKE, C. J., KEMP AND EDINGS, JJ.

HABEAS CORPUS—*errors and irregularities not to be reviewed by.*

It is well settled that a writ of habeas corpus will not be permitted to perform the functions of a writ of error or appeal for the purpose of reviewing errors or irregularities in proceedings of a court having jurisdiction over the person and the subject-matter.

SAME—*same.*

Where the evidence is insufficient to support a verdict finding a defendant guilty of a crime the conviction would be voidable but not void and the defendant's remedy would be by exception or error.

SAME—*same.*

The writ of habeas corpus will not issue unless the court under whose warrant the prisoner is held is without jurisdiction. The writ cannot be used to correct errors.

OPINION OF THE COURT BY COKE, C. J.

The petitioner, Nevencio Gamaya, was indicted by the grand jury of the circuit court of the second circuit for the crime of rape alleged to have been committed upon one Asano Shimizu. The indictment charges as follows: "that Nevencio Gamaya at Waikapu in the County of Maui, Territory of Hawaii, on to wit the 23rd day of May 1919 did ravish and have carnal intercourse with one Asano Shimizu, a female person, by force and against her will. Contrary to the form of the statute in such

Opinion of the Court.

cases made and provided." The cause was tried before a jury which resulted in the following verdict: "We, the jury, in the above entitled cause, find the defendant not guilty of the offense of rape, but guilty of an indecent assault." Upon this verdict, fixing the guilt of the petitioner, he was sentenced to imprisonment at hard labor for a term of five years and to pay a fine of one hundred dollars and the costs of the trial. A mittimus was issued and petitioner was delivered to the custody of the high sheriff of the Territory and is now serving the sentence imposed upon him. The petitioner made application for a writ of habeas corpus. The writ was ordered by the chief justice and made returnable before the supreme court on April 6, 1920. W. P. Jarrett, the high sheriff, made return to the writ by showing that the prisoner is held by him by virtue of the mittimus issued out of the circuit court. The high sheriff through the attorney general's department also interposed a demurrer to the petition for the reasons: "(1) That the said writ of habeas corpus and the petition therefor does not state facts sufficient to entitle the petitioner to the relief prayed for or any relief. (2) That the said petitioner is not entitled to the writ of habeas corpus to review any error that may have been committed in the circuit court of the second judicial circuit in this case; (3) That the writ of habeas corpus cannot be used to take the place of a writ of error, bill of exceptions, or other method provided by law for a review in the supreme court of cases tried in the circuit court."

The petitioner urges that as he was tried under an indictment charging the crime of rape the verdict of the jury finding him guilty of an indecent assault was unwarranted by law and the sentence imposed upon him by the court is void and his incarceration illegal. Section 3894 R. L. 1915 defines the crime of rape and prescribes

Opinion of the Court.

punishment therefor as follows: "Whoever commits a rape, that is, ravishes or has carnal intercourse with any female, by force and against her will, shall be punished by a fine not exceeding one thousand dollars, and imprisonment at hard labor for life or any number of years." Indecent assault is defined in section 3897 as follows: "Whoever takes indecent or improper liberties with the person of a female child under the age of twelve years without committing or intending to commit the crime of rape shall be deemed guilty of indecent assault and on conviction thereof shall be punished by a fine not exceeding one thousand dollars or imprisonment at hard labor for not more than five years or both." Section 3898 provides that "Under an indictment charging a defendant with rape or with carnal abuse of a female child under the age of twelve years or with assault with intent to commit either of said offenses, the jury may find the defendant guilty of indecent assault if the facts so warrant." Under the last section authority is conferred upon a jury to return a verdict of guilty of indecent assault, if the facts warrant, under an indictment charging the defendant with rape. The facts which would justify a verdict of that nature would be that the defendant had taken indecent or improper liberties with the person of a female child under the age of twelve years without committing or intending to commit the crime of rape.

For ought that the record before us discloses every element which constitutes the crime of indecent assault may have been fully established before the jury and in that event the judgment of conviction and the sentence imposed would be entirely proper. In the absence of any showing to the contrary we must presume that evidence was adduced at the trial sufficient to sustain the verdict. (12 Cyc. 887, 888.) If as a matter of fact the female alleged to have been assaulted was of the age of twelve

Opinion of the Court.

years or over, or if for any other reason the evidence was insufficient to support the verdict, the conviction would be voidable but not void and the petitioner's remedy would be by exception or error.

It is well settled that a writ of habeas corpus will not be permitted to perform the functions of a writ of error or appeal for the purpose of reviewing errors or irregularities in proceedings of a court having jurisdiction over the person and the subject-matter. In the present case it cannot be contended that the court did not have jurisdiction over the defendant or the crime of which he was found guilty. The purposes for which the writ of habeas corpus may be employed and the rules in respect thereto are announced in *Ex Parte Fugihara Oriemon*, 13 Haw. 102. *In re Belt*, 159 U. S. 100, it is said that a fundamental rule governing the issuance of the writ of habeas corpus is "that the writ of habeas corpus will not issue unless the court under whose warrant the petitioner is held is without jurisdiction; and that it cannot be used to correct errors." See also *People v. Heider*, 225 Ill. 347.

The writ is discharged and the petitioner remanded.

Eugene Murphy for petitioner.

J. Lightfoot, Deputy Attorney General, and *E. R. Bevins*, County Attorney of Maui, for respondent.

Syllabus.

HOOMANA NAAUAO O HAWAII, A CORPORATION,
BY J. E. K. MAIA, A. L. NAKEA, D. K. DIAMOND,
A. I. BRIGHT, ROBERT AKANA, J. A. HOO-
KAMA, RICHARD WEEDON, C. L. KEALOHA,
F. A. KAKALIA, M. K. KANEIAKALA AND
ISAIA POAI *v.* W. S. J. O. MAKEKAU, J. ISE-
RAELA, L. R. KEKUEWA, MRS. KAHALEWEHI
BAKER, G. NICHOLAS, H. PELE, SAMUEL KE-
ANU, ALEX. GEORGE AND W. E. EDMUNDS.

No. 1260.

APPEAL FROM CIRCUIT JUDGE FIRST CIRCUIT.

HON. C. S. FRANKLIN, JUDGE.

SUBMITTED APRIL 8, 1920.

DECIDED APRIL 20, 1920.

COKE, C. J., KEMP AND EDINGS, JJ.

CORPORATIONS—*meetings*—*call*.

A call of a corporate meeting in the legal sense of the term is a summons or notice to the parties entitled to meet directing them to do so.

SAME—*same*—*same*.

The by-laws of the corporation provide that the annual meeting may be called by the president or by the board of trustees. The board met May 11 and decided to call the meeting for July 28. The president on June 20 issued and had published a call of the convention for July 21. The board did not publish or otherwise give notice of its call until June 27. Held, that the publication of the notice constituted the call and the call of the president being published first was therefore the legal call.

SAME—*same*—*same*.

Where the power to call a corporate meeting is vested in either of two officials of a corporation the one first legally exercising the power in a given case does so to the exclusion of the other.

OPINION OF THE COURT BY KEMP, J.

This is an appeal from a decree of the first judge of the circuit court of the first judicial circuit dismissing the

Opinion of the Court.

appellants' petition for a writ of quo warranto directing the respondents-appellees to show by what authority they act and claim the right to act as trustees of the Hoomana Naauao o Hawaii, a corporation.

The petitioners-appellants claim that the annual meeting or convention of said corporation was convened July 21, 1919, pursuant to a call duly and regularly issued by the then president of the corporation and that said convention proceeded in accordance with the constitution and by-laws of the corporation to elect officers and members of the board of trustees for the ensuing year and that petitioners are the officers and trustees so elected at said convention.

The claim of the respondents is that the annual convention of said corporation was convened on July 28, 1919, pursuant to a call duly and regularly issued by the board of trustees of the corporation and that said convention proceeded in accordance with the constitution and by-laws of said corporation to elect officers and members of the board of trustees for the ensuing year and that they are the officers and trustees so elected at said convention.

Section 12 of the by-laws of the Hoomana Naauao o Hawaii provides that "The annual sessions of this association shall be called to order at the time specified in the call of the president or of the board of trustees in the month of July of each year." Section 4 of the constitution provides that the officers shall be elected by ballot from the membership defined in section 3 in July of each year in Honolulu. Both conventions met in Honolulu in July so there is no controversy raised by either party on this score.

The main contention of the parties centers around the calls for the convention, each faction claiming that the call on which it relies was first and therefore the legal

Opinion of the Court.

call of the convention. The only provision relating to the calling of the annual convention is that contained in section 12 of the by-laws above quoted. The evidence shows that on June 20, 1919, the president of the corporation caused a call of the annual convention for July 21, 1919, to be published in the Nupepa Kuokoa, a weekly newspaper published in Honolulu in the Hawaiian language, and that on June 27, 1919, the call of the board of trustees was published in the same newspaper. The call of the president is not dated. The call of the board of trustees is dated June 23, 1919, but recites that it is in accordance with what was considered by said assembly during the session of January, 1919, at Kaunakakai, Molokai, and said time was approved by its board of trustees on May 11, 1919. From these facts we see that the call of the president was published three days prior to the date of the published call of the board of trustees and one week prior to the first publication of their call, while the board of trustees, as testified to by members of said board and recited in their notice, determined or decided on May 11, 1919, to fix July 28, 1919, as the date of the convention.

Upon this state of facts the circuit judge decided that the call of the board of trustees was first and applied the principle that where two persons or courts exercise concurrent jurisdiction or power the first person or court to exercise that jurisdiction or power in a particular case does so to the exclusion of the other person or court. He therefore decided that the convention called by the board was the duly and legally called convention and the respondents the legally elected officers and trustees. The parties both accept the principle upon which the decision is based as correct. The principle is undoubtedly sound and the correctness of the conclusion reached therefore depends upon whether the facts justify the holding that

Opinion of the Court.

the call of the board was first. If the action of the board on May 11, 1919, constituted a call of the convention then there can be no question that their call was first. On the other hand, if as contended by the petitioners the publication of the notice constituted the call then the undisputed facts show that the call of the president was first and the convention at which petitioners were elected was the legal one and they the legally elected officers and trustees. In *State v. Hall*, 144 Pac. 475, 478, it is said that "a call of a meeting in the legal sense of the term is a summons or notice to the parties entitled to meet directing them to do so. It involves something more than a mere purpose or determination on the part of the caller. It implies a communication of that purpose or notice to the parties to be affected." Practically the same language is used in 1 Words and Phrases 944. *P. & F. R. Ry. Co. v. Com'rs. of Anderson County*, 16 Kans. 302, 307, involved the question of whether a special meeting of the board of commissioners was a legal one. The Kansas statute, after providing for meetings of the board in regular sessions, adds, "and in special session on the call of the chairman at the request of two members of the board, as often as the interests of the county may demand." The statute does not specify whether the call shall be verbal or in writing, how long prior to the meeting it shall be made, nor does it require a record to be made of it. And the same is true as to the request. The court after calling attention to the statute says: "But it still requires a 'call' and a call of a meeting in the legal sense of the term is a summons to the parties entitled to meet directing them to meet. It involves something more than a mere purpose or an expression of that purpose unheard, unseen, and unknown. It implies a communication of that purpose to the parties to be affected by it. How it shall be communicated is sometimes prescribed by

Opinion of the Court.

statute or by by-law. It is sometimes provided that it shall be by publication in the newspaper, sometimes by printed notice served personally or at the residence, and sometimes by mere oral personal notice. But in some way or other notice must be given; and if there be no regulation as to the manner of notice it must be personal, 'at least where personal notice is practicable.' "

The only communication or notice to the parties entitled to meet of the determination of the board of trustees to call the convention for July 28 is the published notice dated June 23 and published June 27. The president's call was published June 20. Applying the principles announced by the authorities cited we are impelled to the conclusion that the publication constituted the call of the convention and that the circuit judge was not justified in holding that the call of the board of trustees was first but should have held the call of the president to be first and the convention held pursuant thereto the legal convention unless both conventions were illegal for want of proper notice.

The question of the sufficiency of notice by publication was not raised by either party in the court below and was not discussed by either party until the question was raised by us. After hearing the parties we have concluded that the question is not properly raised and should therefore not be considered by us. *Detroit v. Detroit Citizens' St. Ry. Co.*, 184 U. S. 368, 381; *Kuala v. Kuapahi*, 15 Haw. 300.

The only other question raised below and considered involved the status of the parties, it being contended by the petitioners that all of the respondents had been expelled from the church and therefore disqualified to hold office. It was also contended by respondents that some of the petitioners had been expelled from the church.

Syllabus.

The circuit judge did not sustain either of these contentions and the parties have acquiesced in his holding.

The decree is reversed and the cause remanded.

Watson & Clemons for petitioners.

Robertson, Castle & Olson for respondents.

A. K. NAHAOLELUA, FOR HIMSELF AND ALL OTHER PERSONS INTERESTED, *v.* JOSEPH J. FERN, AS MAYOR OF THE CITY AND COUNTY OF HONOLULU, TERRITORY OF HAWAII, AND BEN HOLLINGER, W. H. McCLELLAN, LESTER PETRIE, CHARLES N. ARNOLD, EBEN LOW, M. C. PACHECO AND JONAH KUMALAE, SUPERVISORS, COMPRISING THE BOARD OF SUPERVISORS OF THE CITY AND COUNTY OF HONOLULU.

No. 1225.

APPEAL FROM CIRCUIT JUDGE FIRST CIRCUIT.

HON. J. T. DEBOLT, JUDGE.

SUBMITTED APRIL 13, 1920.

DECIDED APRIL 24, 1920.

COKE, C. J., KEMP AND EDINGS, JJ.

EQUITY—dismissal of bill—practice.

Where the bill of complaint is to be attacked for reasons extraneous of the record the correct mode of procedure is by the interposition of a proper plea and not by motion to dismiss.

SAME—same.

The rule obtaining in this jurisdiction is that where the bill itself is deficient the proper defense is by way of demurrer. If for

Opinion of the Court.

reasons appearing upon the face of the bill the suit ought not to be maintained a plea in abatement or other appropriate plea should be interposed.

OPINION OF THE COURT BY COKE, C. J.

The complainant-appellant, A. K. Nahaolelua, filed his bill in equity in the circuit court of the first judicial circuit for an injunction to restrain the respondents from ousting him from his position as keeper of public baths and parks of the City and County of Honolulu. It is alleged in the bill that complainant holds said office and that by reason of an illegal and unauthorized resolution passed by the board of supervisors of the City and County of Honolulu complainant was about to be ousted from his position. There is some attempt on the part of complainant to make it appear in his bill that the proceedings were instituted on his own behalf and on behalf of all others interested. He also attempts to sue in the dual capacity of an employee of the city and county who is about to be illegally deprived of his position and as a taxpayer of the city and county endeavoring to prevent an act which will cause the city and county to suffer irreparable injury, etc. The bill does not disclose the identity of the persons other than himself, for whom he assays to sue, nor does it contain allegations which entitle him to any relief in his capacity as a taxpayer of the city and county. If he may maintain his bill at all under the allegations thereof he must do so in his own behalf and under the allegation that he is about to be illegally deprived of his position. A temporary injunction was granted by the circuit judge.

The respondents, without filing any demurrer, plea or answer, interposed a motion to dismiss the bill and dissolve the temporary injunction on the ground that the complainant subsequently to the filing of the bill of com-

Opinion of the Court.

plaint had been legally discharged from his position and had voluntarily yielded the same up and turned over the keys and property belonging to the city and county to his superior officer, for which reasons the questions involved became moot. This motion is sustained by an affidavit of F. C. Benevedes, superintendent of parks and playgrounds of the City and County of Honolulu. No counter-affidavit was submitted and the circuit judge dismissed the bill and dissolved the injunction. From this order or decree Nahaolelua has perfected an appeal.

It is contended by complainant that if the questions involved have become moot the respondents should have interposed a plea in abatement which would have afforded complainant the opportunity to meet the issue thus raised. This constitutes the sole question in the case which merits discussion.

Section 2477 R. L. 1915 provides that "A defense in equity shall be made by demurrer, plea or answer." Of course under certain circumstances a bill in equity may be dismissed for cause appearing in the record upon the motion of respondent—where, for instance, the complainant during a long period of time has taken no steps towards the prosecution of the suit. This inaction amounting to an abandonment of the litigation the suit may be dismissed on motion of the respondent. The court will dismiss a suit *sua sponte* where the bill is manifestly without equity or where the complainant seeks to enforce a contract which is illegal, immoral or contrary to public policy, and as held in *Estate of Keaho*, 17 Haw. 308, if at the conclusion of the evidence of complainant and respondent also rests the bill may be dismissed on motion of respondent if complainant has failed to sustain his right to equitable relief. But where the bill is to be attacked for reasons extraneous of the record the correct mode of procedure is by the interposition of a proper

Opinion of the Court.

plea. "It is irregular to dismiss a bill in equity on motion for want of jurisdiction upon grounds required to be supported by proofs, except it be accompanied by way of what may be treated as a final hearing upon the pleadings and the facts brought in by stipulation" (*Attorney General v. Supervisors*, 33 Mich. 289). "The court will not dismiss the bill of complaint without going into a plenary hearing unless it appears very clearly on the face of the proceedings that the complainant has no ground of complaint or that the court cannot grant the relief prayed" (*Stebben v. Trezevant*, 3 Desaus. (S. C.) 213). "The court will not upon an ordinary notice of motion to dismiss anticipate the regular trial of a cause by examining the pleadings and proofs to determine whether the court has jurisdiction of the action or whether the complainant is entitled to the relief sought" (*Fuller v. Met. Life Ins. Co.*, 31 Fed. 696). "An objection to the jurisdiction of the court for any cause not apparent on the face of the bill must be taken by special plea" (*Desert King Min. Co. v. Wedekind*, 110 Fed. 877). Fletcher Eq. Pl. & Pr. Sec. 574 is authority for the assertion that motions to dismiss bills for want of equity have under certain circumstances been considered and allowed but they are generally conceded not to be according to approved practice.

Applying these principles and the provisions of section 2477 R. L. 1915 to the case at bar we hold the rule obtaining in this jurisdiction to be that where the bill itself is deficient the proper defense is by way of demurrer. But if for reasons not appearing on the face of the bill the suit ought not to be maintained a plea in abatement or other appropriate plea should be interposed. If as indicated by the motion and affidavit filed herein the complainant was legally ousted from his position or voluntarily surrendered the same after the suit was insti-

Opinion of the Court.

tuted and these facts are disclosed by a proper plea the cause will abate because the questions involved have become moot. *Farmers State Bank v. Thompson*, 261 Fed. 166.

The decree appealed from is reversed.

Andrews, Pittman & O'Brien and *E. J. Botts* for complainant.

W. H. Heen, City and County Attorney, and *R. A. Vitousek*, First Deputy City and County Attorney, for respondents.

MARY SANDERSON *v.* THOMAS SANDERSON.

No. 1218.

MOTION FOR COUNSEL FEES, ETC.

ARGUED APRIL 20, 1920.

DECIDED APRIL 26, 1920.

COKE, C. J., KEMP AND EDINGS, JJ.

Per Curiam: This is a motion presented directly to this court by Mary Sanderson, the appellant, for an order allowing suit money. The proceeding is a novel one. A history of the cause is to be found in *Sanderson v. Sanderson*, ante p. 172, and *Sanderson v. Sanderson*, ante p. 274. For the present purpose it will be sufficient to mention that the appellant Mary Sanderson was awarded suit money by the judge of the circuit court in order to enable her to present her cause in that court. At the conclusion of the trial a decree was made granting a divorce to Thomas Sanderson, the appellee, and awarding to him

Opinion of the Court.

the custody of the minor children of the parties. The appellant then applied to the circuit judge for an order for a further allowance of money to defray her expenses in carrying the cause to this court. This application was denied and appellant came here on appeal from the order of the circuit judge. The action of the circuit judge was affirmed. The appellant then perfected a general appeal from the decree of the circuit judge and specifically included in her notice of appeal the order of the circuit judge refusing suit money to appellant. The question of the propriety of the order of the circuit judge was thus again presented to us with the result that the order of the circuit judge was again affirmed. The appellant now presents an original application to this court for the same relief sought by her application in the court below, the refusal of which had been twice affirmed here. The merits of the application having been finally determined by us the question involved is *res adjudicata* and it is not material whether or not under other circumstances this court might in the exercise of its appellate jurisdiction under section 2252 R. L. 1915 properly entertain an original application for suit money in a divorce appeal.

The motion is denied.

H. L. Grace for the motion.

W. T. Rawlins contra.

Syllabus.

TERRITORY *v.* EDWARD SCHARSCH.

No. 1259.

EXCEPTIONS FROM CIRCUIT COURT FIFTH CIRCUIT.

HON. L. A. DICKEY, JUDGE.

ARGUED APRIL 19, 1920.

DECIDED APRIL 28, 1920.

COKE, C. J., KEMP AND EDINGS, JJ.

CRIMINAL LAW—*trial—public trial—what constitutes.*

Under the Sixth Amendment to the United States Constitution declaring that in all criminal prosecutions the accused shall enjoy the right to a public trial it is error to exclude all persons excepting officers of the court and any one particular person whom the defendant would like to have present.

SAME—*same—same—same—presumption of enforcement of order.*

In the absence of a showing to the contrary it is to be presumed that an order excluding the public from the courtroom during a criminal trial was enforced and that it was prejudicial to the rights of the defendant.

SAME—*same—same—same—denial of constitutional right—presumption of prejudice—burden of proof.*

Where a defendant is denied the constitutional right of a public trial he is presumed to be prejudiced and the burden is not upon him to show injury by reason of the deprivation.

OPINION OF THE COURT BY COKE, C. J.

The defendant Edward Scharsch was indicted, tried and convicted in and before the circuit court of the fifth judicial circuit for the crime of seduction and has now brought the cause to this court upon a bill of exceptions. The bill contains twenty-seven separate exceptions, all of which are set out in detail. Such exceptions as are dealt with in this opinion will be taken up in the order of their importance.

Opinion of the Court.

After the jury was impaneled and sworn the complaining witness, Mary Mandrigues, was duly sworn and was about to proceed with the giving of her testimony when the following proceedings took place:

The Court. "I order all those in the courtroom to leave except the officers of the court."

Mr. Rice (counsel for defendant). "We object to the direction of the court on the ground that it will deprive the defendant of his constitutional rights of a public trial."

The Court. "Is there any one in particular whom the defendant would like to have present?"

Mr. Rice. "No one in particular, but the defendant objects to the exclusion of the public from the courtroom. I make this objection to save the rights of the defendant."

The Court. "The objection is overruled."

Mr. Rice. "We note an exception."

This proceeding is made the subject of defendant's exception No. 5.

While the record does not disclose whether the order was carried into effect, in the absence therein of some showing to the contrary it must be presumed that the order was enforced and if erroneous it was prejudicial to the rights of the defendant. See *State v. Osborne*, 54 Ore. 289.

It is submitted by the defendant that the order of the court deprived him of a public trial as guaranteed by the sixth amendment to the national Constitution, which provides: "In all criminal prosecutions the accused shall enjoy the right to a speedy and public trial." A trial court is possessed of rather wide discretion in the conduct of its proceedings. The court may exclude from the courtroom even in criminal cases persons who become hysterical or those who may be inclined to disturb the orderly progress of the trial or minors during a class of trials the

Opinion of the Court.

evidence in which would tend to degrade public morals or to shock public decency. In extreme cases an order excluding a large portion of the spectators has been sanctioned. But we are aware of no case in this country either in the federal or state courts upholding the course pursued by the circuit court in the present case. In many cases where the order of exclusion was much less sweeping than the one entered herein the appellate courts have uniformly condemned the proceedings in the strongest language.

It seems to be settled that the first ten articles of amendment to the Federal Constitution were not intended to limit the powers of the state governments in respect to their own people but to operate for the national government alone. This was determined almost a century ago by the Supreme Court of the United States in an opinion written by Chief Justice Marshall which has been steadily adhered to to the present date. *Barron v. Baltimore*, 32 U. S. 242; *Spies v. Illinois*, 123 U. S. 131; *Brown v. New Jersey*, 175 U. S. 172. But that the Sixth Amendment is in force in the territories of the United States was determined in *Rasmussen v. United States*, 197 U. S. 516, and that it is in force in this Territory was specifically held in *Ex Parte Higashi*, 17 Haw. 428, 441. Many, if not all, of the state constitutions contain a provision similar to the Sixth Amendment to the Federal Constitution and therefore the decisions of the state courts dealing with the question here involved have application to the case at bar.

In *People v. Murray*, 89 Mich. 276, the opinion is summarized in the syllabus as follows: "An order by a court in a criminal case directing an officer to stand at the door of the courtroom 'to see that the room is not overcrowded and that all respectable citizens be admitted and have the opportunity to get in when they shall apply'

Opinion of the Court.

violates the rights of the respondent to a public trial guaranteed to him by section 28, article 6 of the Constitution."

People v. Hartman, 103 Cal. 242, is peculiarly analogous to the case at bar. We quote from the opinion: "The appellant was convicted of an assault with intent to commit rape, and now presents his appeal from the judgment of conviction. When the information had been read to the jury and the defendant's plea stated, on motion of the district attorney and against the objection of the defendant, the court made an order excluding from the courtroom, during the trial of the case, all persons except the officers of the court and the defendant. This was a novel procedure, and has no justification in the law of modern times. We know of no case decided in this country supporting the course of procedure here pursued. It is in direct violation of that provision of the constitution which says that a party accused of crime has a right to a public trial. The fact that the officers of the court were allowed to be present in no way made the trial public. For the purposes contemplated by the provision of the constitution, the presence of the officers of the court, men whom, it is safe to say, were under the influence of the court, made the trial no more public than if they too had been excluded. While a right to the public trial contemplated by the constitution does not require of courts unreasonable and impossible things, as that all persons have an absolute right to be present and witness the court's proceeding, regardless of the conveniences of the court and the due and orderly conduct of the trial, yet this provision must have a fair and reasonable construction in the interest of the person accused. Judge Cooley, in his work upon Constitutional Limitations, page 383, has well declared the true rule in the following language: 'The requirement of a public trial is for the

Opinion of the Court.

benefit of the accused; that the public may see that he is fairly dealt with and not unjustly condemned, and that the presence of interested spectators may keep his triers keenly alive to a sense of their responsibility, and to the importance of their functions; and the requirement is fairly observed if, without partiality or favoritism, a reasonable proportion of the public is suffered to attend, notwithstanding that those persons whose presence could be of no service to the accused, and who would only be drawn hither by a prurient curiosity, are excluded altogether.' ”

In *Williamson v. Lacy*, 86 Me. 80, Mr. Chief Justice Peters dealt with the subject now before us in the following emphatic manner: “History brings us too vivid pictures of the oppressions endured by our English ancestors at the hands of arbitrary courts ever to satisfy the people of this country with courts whose doors are closed against them. They instinctively believe that it is their right to witness judicial trials and proceedings in the courts. It is true that courts have discretionary powers to be exercised in such a matter—but not an unlimited discretion. The almost boundless authority exercised by the court of Star Chamber in England was the seed of its own destruction, and was its historical infamy. Its lessons are not lost on the courts of today. We never knew of any court of general jurisdiction in this state conducting a strictly private criminal trial, nor, before this, of such a trial before a common magistrate.”

In *State v. Osborne*, *supra*, Mr. Justice King, in an admirable opinion which virtually exhausts the subject, holds that a court order in a prosecution for assault with intent to commit rape which excluded from the courtroom all persons except the defendant, the attorneys engaged in the trial, the jury and officers of the court and the wit-

Opinion of the Court.

nesses while on the stand was error and condemns it in vigorous language.

A most recent case is *Davis v. United States*, 247 Fed. 394. In the opinion of the court rendered in that case the subject is dealt with at length and the leading authorities are collected and reviewed. We quote from the opinion as follows: "Near the conclusion of the trial which lasted several days a night session of the court was held for the arguments to the jury. When the jurors were in the box, and just before the court convened, the courtroom, which had become crowded, was by the direction of the trial judge cleared of all spectators except relatives of the defendants, members of the bar, and newspaper reporters, and a bailiff at the door was instructed to admit none but those of the excepted classes. The bailiff thereafter admitted a few others, but it was by way of favor of the court officers. Some citizens against whom no objection appeared on account of character or condition afterwards sought and were denied admission. The seats in the audience part of the courtroom back of the bar rail would have accommodated at least 100 spectators. About 25 were allowed to be present. Within the rail, besides the court officials and the defendants, a couple of women relatives of the latter, a few newspaper men, and about 10 members of the bar were present. The reasons for the action of the court were these: The crime of which defendants were charged had connection with a train robbery, and the trial, which was held at Muskogee, Okl., excited more than ordinary interest. At previous sessions the courtroom was crowded with spectators, so much so that in one instance the court directed the bailiffs to clear the aisles, so that witnesses would not be impeded when called. Considerable ill feeling had developed between the defendants, their relatives and friends, and some of the witnesses for the prosecution, and the court

Opinion of the Court.

had placed the latter in the custody and care of an officer. Precautions had also been taken that defendants should come unarmed into the courtroom. On the evening of the night session an encounter occurred in a restaurant, in which a relative of one of the defendants hit a witness for the prosecution across the face with a newspaper. This was reported to the court; also that one or more of the witnesses in the courtroom were intoxicated. It does not appear that the courtroom was crowded beyond its seating capacity when the order to clear it was made, or that any person was making a disturbance or threatening to do so, or that there was any well-founded apprehension that a disturbance would occur.

“We appreciate the better position of the trial court to appraise the significance of surrounding conditions, but we cannot avoid the conviction that it acted upon the representations of those who did not adequately realize the great importance of keeping a place where the justice of the nation is judicially administered a public place for the admission of peaceful citizens. An intoxicated man could have been excluded or removed; the aisles and passageways could have been kept clear; when the seats were filled, other spectators could have been denied at the door; if the noise in the lobbies interfered with the proceedings, the lobbies could have been cleared; and individuals whose conduct outside the courtroom made their presence within a menace might have been excluded. But it is quite a different thing to exclude the public generally, regardless of their conduct or character. The Sixth Amendment provides that ‘in all criminal prosecutions the accused shall enjoy the right to a * * * public trial.’ The provision is one of the important safeguards that were soon deemed necessary to round out the Constitution, and it was due to the historical warnings of

Opinion of the Court.

the evil practice of the Star Chamber in England. The corrective influence of public attendance at trials for crime was considered important to the liberty of the people, and it is only by steadily supporting the safeguard that it is kept from being undermined and finally destroyed. As the expression necessarily implies, a public trial is a trial at which the public is free to attend. It is not essential to the right of attendance that a person be a relative of the accused, an attorney, a witness, or a reporter for the press, nor can those classes be taken to be the exclusive representatives of the public. Men may have no interest whatever in the trial, except to see how justice is done in the courts of their country. The qualifications of the broad scope of the constitutional provision and of like provisions in the constitutions of the states are few, and are based upon considerations of public morals and peace and good order in the court-rooms. * * * It is urged that no prejudice to defendant was shown. A violation of the constitutional right necessarily implies prejudice and more than that need not appear. Furthermore, it would be difficult, if not impossible, in such cases for a defendant to point to any definite, personal injury. To require him to do so would impair or destroy the safeguard."

We might with entire propriety adopt the foregoing language as our opinion in this case for little in addition is left to be said. The order of the court in the present case deprived the accused of a right guaranteed to him by the Federal Constitution and the exception thereto must be sustained.

The other exceptions brought up have reference mainly to the overruling by the court of the defendant's demurrer to the indictment, his motion to make the bill of particulars more specific, his motion for a directed verdict and his motion for a new trial, also errors alleged

Opinion of the Court.

to have been committed by the trial court having to do with the introduction of evidence at the trial of the cause and certain of the instructions given to the jury at the request of the prosecution as well as the refusal to give other instructions requested by the defendant.

The indictment is laid in the language of the statute and falls short of setting forth specifications of acts and descriptive circumstances as to sufficiently fix and determine the identity of the offense with such particularity as to apprise the accused of what he has to meet. See *Territory v. Pupuhi*, 24 Haw. 565; 22 Cyc. 293. After the demurrer was overruled defendant presented a motion for a bill of particulars. The prosecution thereupon presented a bill of particulars which we think sufficiently describes the offense charged and thus cured the defects in the indictment.

Such other errors, if any, as were committed by the trial court prejudicial to the rights of the defendant we think will not recur on a new trial of the case hence no useful purpose will be served by a discussion of the other exceptions.

Defendant's exception No. 5 is sustained and the cause is remanded for a new trial.

E. K. Aiu for the Territory.

P. L. Rice for defendant.

Syllabus.

REBECCA HOUGHTAILING, THROUGH AND BY
FREDERICK E. STEERE, HER GUARDIAN, *v.*
GEORGE DE LA NUX, JR., DANIEL DE LA
NUX, GEORGE F. DE LA NUX AND LAHAPA
DE LA NUX.

No. 1220.

ERROR TO CIRCUIT JUDGE FIRST CIRCUIT.

HON. W. H. HEEN, JUDGE.

ARGUED APRIL 20, 1920.

DECIDED MAY 5, 1920.

COKE, C. J., KEMP AND EDINGS, JJ.

APPEAL AND ERROR.

By the provisions of section 2522 R. L. 1915 as amended by Act 44 S. L. 1919 this court is precluded on a writ of error from reversing any finding depending on the credibility of witnesses or the weight of evidence.

EQUITY—*laches*—*statute of limitations*.

The question of laches does not depend, as does the statute of limitations, upon the fact that a certain definite time has elapsed since the cause of action accrued, but whether under all of the circumstances of the particular case complainant is chargeable with a want of due diligence in failing to institute suit before she did.

APPEAL AND ERROR—*sufficiency of bill*—*point waived when not seasonably made*.

A question not jurisdictional and which was not raised by demurrer nor in appellants' specifications of error nor in their brief comes too late to have consideration when presented for the first time during the oral argument of counsel.

OPINION OF THE COURT BY COKE, C. J.

This is a suit in equity instituted by Rebecca Houghtailing, complainant-appellee, through Frederick E. Steere, her guardian, against George De La Nux Jr. and Daniel De La Nux, respondents-appellants, to reform a

Opinion of the Court.

deed. The deed in question purports to convey to the grantees therein named a certain piece of land situated on Kamehameha IV road, Kalihi, Oahu, with the improvements thereon, which property was at the time, and still is, occupied by the grantor as a home. There is a separate clause in the deed reading as follows: "And also all and singular my real and personal property by me possessed and wheresoever situate." It is this last clause which the appellee alleges was inserted in the deed through the fraud and deception of George F. De La Nux, the father of the grantees, and which appellee now seeks to have eliminated from the deed by reformation thereof. By the terms of the deed the appellee reserved to herself a life estate in all the property conveyed. The grantees were minors at the time the suit was instituted and their father, George F. De La Nux, was duly appointed their guardian ad litem. On the 1st day of December, 1918, George De La Nux Jr. died and the bill was amended by making George F. De La Nux and Lahapa De La Nux, father and mother respectively of the deceased grantee and his heirs at law, parties defendant. It appears that on the 11th day of April, 1916, Rebecca Houghtailing was declared a spendthrift owing to the use of intoxicating liquor and Frederick E. Steere was appointed the guardian of her person and estate. On the 19th day of April, 1917, the said guardian was ordered and directed by the judge of the probate court of the first judicial circuit to institute proceedings to bring about a reformation of the deed in accordance with the prayer of the bill filed herein, and on the 24th day of May, 1917, suit was filed. The deed purports to have been signed by Rebecca Houghtailing on the 10th day of June, 1905, and acknowledged by her before a notary public on the 8th day of November, 1905. It was recorded in the office of the registrar of conveyances in Hono-

Opinion of the Court.

lulu on the 2d day of July, 1910. The clause in the deed to which objection is made by appellee affects extensive and valuable real and personal property and it is alleged in the bill "That the insertion of the said provision in said deed conveying property other than the said homestead was without the consent or knowledge, and was against the will of the said Rebecca Houghtailing, and was at the instigation, suggestion and connivance of the said George F. De La Nux, and was inserted therein with intent on the part of him, the said George F. De La Nux to deceive and defraud the said Rebecca Houghtailing, and with intent on the part of him, the said George F. De La Nux to have the said deed executed at a time when her condition, owing to the excessive use of intoxicating liquors, combined with her lack of knowledge of business and business affairs, would not permit her to appreciate the full force and effect of the instrument so to be executed by her; and that said instrument was executed at a time when the said Rebecca Houghtailing was under the influence of intoxicating liquors, and that in having the same executed at the said time, the said George F. De La Nux did intend to deceive and defraud the said Rebecca Houghtailing and did deceive and defraud her."

At the conclusion of the trial a decision was rendered by the judge of the trial court wherein the evidence is extensively reviewed and it was found that Rebecca Houghtailing was at the time the deed in dispute was executed a person addicted to the extensive use of intoxicating liquor; that because of her habitual intemperance she was unable to attend to business affairs and for that reason was obliged to have others undertake the management of her large estate; that also because of such habitual intemperance she was easily influenced by her son George; that she was deceived and defrauded by him by

Opinion of the Court.

being made to believe that the deed conveyed only the Kalihi home; that she succumbed to such deception and fraud because of the trust and confidence that she placed in her son George and that the deed in question should be reformed by striking therefrom the words "and also all and singular my real and personal property by me possessed and wheresoever situate." A decree in accordance with the findings contained in the decision was made and entered.

The cause is brought here on error by the appellants. The errors relied upon as contained in appellants' opening brief are as follows: (1) That the trial judge erred in causing the said deed to be reformed on the ground of fraud and deception; (2) that the trial judge erred in deciding from the evidence that plaintiff was deceived and defrauded by George F. De La Nux and that by reason of such deception and fraud signed the deed in question; (3) that the trial judge erred in not dismissing the complaint on the ground of laches on the part of the plaintiff; (4) that the trial judge erred in not dismissing the complaint on the ground that said complaint did not contain the necessary and essential allegations to maintain this suit.

Specifications of error Nos. 1 and 2 present matters which necessarily depend upon the credibility of witnesses and the weight of evidence. There was evidence which affirmatively shows that Rebecca Houghtailing is an Hawaiian woman about fifty-six years of age; that she is without knowledge of business affairs and is, and for many years has been, unable to manage her estate; that for more than twenty years last past she has been addicted to the excessive use of alcoholic liquors; that although she has other children and numerous grandchildren, some at least of whom appear to have a greater claim to her affections and bounty than the two grantees

Opinion of the Court.

named in the deed; that it was her intention and purpose to grant to the children of her son George her home situated on Kamehameha IV road, but that in the preparation of the deed George took advantage of her mental weakness and by fraud and deceit and without her knowledge or consent caused to be inserted in the deed the clause now complained of and which if permitted to stand would upon the death of Rebecca vest her entire estate in George's two children, their heirs or assigns. It is true this evidence was controverted by the testimony of witnesses introduced on behalf of the appellants but we are not on a writ of error permitted under section 2522 R. L. 1915, as amended by Act 44 S. L. 1919, to reverse the decree for any finding depending on the credibility of witnesses or the weight of evidence.

The third assignment presents as error the failure of the trial judge to dismiss the complaint on the ground of laches on the part of complainant. In this connection counsel for respondents argue that this is in fact a real action to recover possession of land and therefore the statute of limitations (Sec. 2651 R. L. 1915) applies. The section reads: "No person shall commence an action to recover possession of any lands, or make any entry thereon, unless within ten years after the right to bring such action first accrued."

But this is not an action to recover the possession of land but is a suit in equity to reform a deed. The complainant has at all times been, and still is, in possession of the property. The position of the parties has not changed since the date of the execution of the deed and of course no rights of third parties have intervened. We are of the opinion that the statute of limitations cannot be invoked to defeat the suit.

In *Rose v. Parker*, 4 Haw. 593, this court said: "It is urged that the plaintiffs are barred of this recovery by

Opinion of the Court.

the statute of limitations. We understand that courts of equity not only act in obedience and in analogy to the statute of limitations in proper cases, but they also interfere in many cases to prevent the bar of the statute where it would be inequitable or unjust." This same question was before the Supreme Court of the United States in *Townsend v. Vanderwerker*, 160 U. S. 171. The court in that case laid down the rule to be that "The question of laches does not depend, as does the statute of limitations, upon the fact that a certain definite time has elapsed since the cause of action accrued, but whether, under all the circumstances of the particular case, plaintiff is chargeable with a want of due diligence in failing to institute proceedings before he did." See also *Gunton v. Carroll*, 101 U. S. 426; *Harris v. Ivey*, 21 So. 422; *Jones v. McNealy*, 35 So. 1022.

The fourth assignment of error presents a general attack upon the entire bill for the reason that it does not contain the necessary allegations to maintain the suit. No particular defect in the bill is pointed out and we are left to grope through the pleadings seeking as best we may for defects therein. Obviously these are matters which should have been taken advantage of on demurrer. The bill may not be a model of good pleading. It perhaps should have contained an averment specifying the time at which Rebecca discovered the fraud and a further averment in explanation of her failure to promptly seek relief against the fraud which she claims was perpetrated upon her. But in the absence of a demurrer the cause went to trial upon the bill and answers and whatever defects the bill contained were cured by the proofs submitted at the trial. It is in evidence that Mrs. Houghtailing became aware of the fraud in 1911 but it was also shown that at that time and during the intervening period up to the date of the appointment of Mr. Steere

Opinion of the Court.

as her guardian her mental condition was such as would excuse her inaction. In other words, all apparent laches were accounted for. Very shortly following Mr. Steere's appointment this suit was instituted.

In their oral argument before us counsel for appellants for the first time attempt to urge that there was no proper allegation or showing of a demand upon the appellants for the reformation of the deed prior to the institution of the suit. The record does show that there was a demand upon George F. De La Nux, the father of the grantees. But without determining whether a demand was necessary as a prerequisite to the suit, or if such demand was necessary whether the demand upon the natural guardian was sufficient, the point was not contained in the specifications of error nor is it given the slightest mention in the briefs of appellants. It is not a jurisdictional question and comes too late to have consideration when presented for the first time during the oral argument of counsel.

The record herein presents a clear case where a confiding woman whose mind has been enfeebled by the excessive use of alcoholic liquor was by fraud, deceit and misrepresentation induced by her son to execute a deed to his children of all of her large estate to the exclusion of her other children and numerous grandchildren. The facts and circumstances divulged convince us, as they convinced the judge of the lower court, that Mrs. Hough-tailing never had in mind the conveyance of any property other than her house and lot situated on Kamehameha IV road.

The decree appealed from ought to be, and therefore is, affirmed.

A. Withington and *A. D. Larnach* (*Castle & Withington* and *A. D. Larnach* on the brief) for complainant.

R. J. O'Brien (*Andrews & Pittman* and *E. J. Botts* on the brief) for respondents.

Syllabus.

IN THE MATTER OF THE APPLICATION OF SIDNEY K. LORIGAN, DOCTOR OF DENTAL SURGERY, FOR A WRIT OF MANDAMUS DIRECTED TO THE BOARD OF DENTAL EXAMINERS OF THE TERRITORY OF HAWAII, AND TO M. E. GROSSMAN, D. D. S., O. E. WALL, D. D. S., AND F. E. CLARK, D. D. S., THE MEMBERS OF THE BOARD OF DENTAL EXAMINERS OF THE TERRITORY OF HAWAII.

No. 1239.

APPEAL FROM CIRCUIT JUDGE FIRST CIRCUIT.

HON. W. H. HEEN, JUDGE.

ARGUED APRIL 2, 1920.

DECIDED MAY 10, 1920.

**COKE, C. J., KEMP, J., AND CIRCUIT JUDGE DEBOLT
IN PLACE OF EDINGS, J., ABSENT.**

MANDAMUS—*office of—judicial or quasi-judicial power.*

In a mandamus proceeding to coerce a judicial officer or any person or board in the exercise of judicial or quasi-judicial power the sole legitimate purpose thereof is to set such person or board in motion; to command him or it to act, not how to act.

SAME—*same—discretion—what constitutes discretion.*

Where there is no reasonable ground to justify a decision by such officer or board other than one way a refusal to find accordingly is not an exercise of discretion but a refusal to exercise it and where there is no legal remedy the court will award its writ of mandamus to compel the person or body to find the facts in accordance with the evidence.

PHYSICIANS AND SURGEONS—*board of examiners—powers quasi-judicial.*

Under our statute (Sec. 1041 R. L. 1915) providing for the examination of candidates for licenses to practice dentistry the board in passing upon the qualification of candidates exercises quasi-judicial powers and its decision as to qualifications cannot be controlled by mandamus unless the evidence before it will admit of but one conclusion, viz., that the candidate passed the required grade.

Opinion of the Court.

OPINION OF THE COURT BY KEMP, J.

The petitioner, Sidney K. Lorigan, applied to the board of dental examiners of the Territory of Hawaii on December 16, 1918, for a license to practice dentistry under the laws of this Territory. He complied with all of the laws of the Territory and the rules of said board prerequisite to his right to an examination by said board as to his proficiency. He was thereupon permitted to and did take the examination which commenced on January 15, 1919, and ended on February 8, 1919. On February 10, 1919, the board through its secretary notified the petitioner that he had not passed an examination satisfactory to said board and had been refused a license to practice dentistry in the Territory of Hawaii. Thereafter on March 24, 1919, upon the application of the petitioner the Hon. W. H. Hæen, circuit judge of the first judicial circuit, issued an alternative writ of mandamus directed to said board of dental examiners and to the several members thereof commanding them and each of them to issue to the petitioner forthwith a license to practice dentistry in the Territory of Hawaii or to show cause, if any said board or said members have, why the relief prayed for should not be granted.

The gist of the petitioner's complaint is set forth in paragraphs 6, 7, 8, 9, 11 and 12 of his petition and the alternative writ issued thereon as follows:

"VI. That your petitioner complied with all the laws of the Territory of Hawaii and the rules of said board of dental examiners required of him as an applicant for a license to practice dentistry in the Territory of Hawaii; that petitioner passed the examination given him by said board, as aforesaid, in every way and manner provided by said board and the laws of the Territory of Hawaii and is legally entitled to practice dentistry in the Territory of Hawaii, which license is wilfully, maliciously and unlawfully denied your petitioner by said board, as more fully appears from the allegations of this petition."

Opinion of the Court.

“VII. That said board of dental examiners, at the time of petitioner’s application for examination to practice dentistry in the Territory of Hawaii, as aforesaid, and at the time the examination of your petitioner was passed upon by said board, had established a general average grade of seventy-five per cent. (75%) as the grade necessary to entitle an applicant to practice dentistry in the Territory of Hawaii.”

“VIII. That petitioner in his examination by said board of dental examiners, as aforesaid, answered all of the questions propounded to him by said board fully, clearly and satisfactorily, and in the manner required by said board to entitle petitioner to a license to practice dentistry in the Territory of Hawaii, in this, to-wit, that the answers given by petitioner and the practical work done by him entitled petitioner to a general average grade of more than seventy-five per cent. (75%), being in excess of the grade required by said board to entitle petitioner to a license to practice dentistry in the Territory of Hawaii, as aforesaid.”

“IX. And your petitioner further alleges and charges that, although your petitioner complied with all the laws of the Territory of Hawaii and the rules and regulations of said board of dental examiners required of your petitioner to entitle him to a license to practice dentistry in the Territory of Hawaii, as aforesaid, said board of dental examiners did not arrive at a fair and just conclusion in refusing your petitioner a license to practice dentistry in the Territory of Hawaii, but acted in a biased, prejudiced and arbitrary manner.”

“XI. That the said Wall and Grossman, who are now, and were at all times herein mentioned, members of the board of dental examiners of the Territory of Hawaii, are prejudiced against your petitioner by reason of the attitude of said Dr. High, as aforesaid; that the said Grossman, Wall and Clark refused to grant petitioner a license to practice dentistry in the Territory of Hawaii, well knowing that petitioner had passed a satisfactory examination, as aforesaid, because the said Grossman, Wall and Clark do not desire any competition with additional haole dentists

Opinion of the Court.

and have entered into a conspiracy to use their office as members of said board for the purpose of preventing qualified haole dentists not already practicing dentistry in the Territory of Hawaii from obtaining a license to practice their profession within said Territory, and that your petitioner, by the arbitrary and unwarranted action of the said board of dental examiners, as aforesaid, has been deprived of his constitutional right to earn his livelihood in his profession in the Territory of Hawaii; that petitioner, by reason of the unwarranted action of said board in denying him a license to practice dentistry in the Territory of Hawaii has suffered financially and has been irreparably damaged."

"XII. And your petitioner further alleges that the said O. E. Wall, one of the members of said board of dental examiners, owns and conducts the Hawaiian Dental Supply Company, which company sells dental supplies in Honolulu; City and County of Honolulu, Territory of Hawaii; that your petitioner is informed and believes, and upon such information and belief, alleges that the said O. E. Wall uses his position as a member of said board of dental examiners to further his own financial ends by advocating the granting of licenses to practice dentistry in the Territory of Hawaii to applicants who will purchase dental supplies from said Honolulu Dental Supply Company. And your petitioner is informed and believes, and upon information and belief, alleges that the said O. E. Wall, through the Honolulu Dental Supply Company, sells dental supplies to unlicensed dentists practicing dentistry in the Territory of Hawaii. And your petitioner further alleges that one K. L. Chang made application to said board of dental examiners for a license to practice dentistry in the Territory of Hawaii on or about the same date that your petitioner applied for such examination, as aforesaid, and that the said Chang was duly examined by said board and granted a license to practice dentistry in the Territory of Hawaii. And your petitioner further alleges that a comparison of the examination papers of the said Chang and of your petitioner, and of the practical work performed by the said

Opinion of the Court.

Chang and by your petitioner, at the time of said examination, will show that your petitioner passed higher grade than the said Chang. And your petitioner further alleges that the granting to the said Chang of a license to practice dentistry in the Territory of Hawaii and the refusal of a license to your petitioner, as aforesaid, was, as petitioner is informed and believes, due to the fact that the said Chang would not compete with the haole dentists practicing dentistry in the Territory of Hawaii, and that the said Chang had agreed to purchase from the said Honolulu Dental Supply Company certain dental supplies in the event that he received a license to practice dentistry in the Territory of Hawaii."

It appears from the record before us that the respondents interposed a demurrer to the petition and/or the alternative writ of mandamus which was overruled but the demurrer has not been brought up for review by us and we are unable except from statements in the briefs to ascertain what the grounds of demurrer were.

The respondents in response to the order to show cause after the overruling of their demurrer filed their answers in which they admitted that the petitioner had complied with the law and the rules of the board entitling him to take the examination and that he did take the examination at the time alleged by him; they also admit the truth of the allegation to the effect that the board had adopted a rule which was in force at the time petitioner applied for and took the examination that they would require a grade of 75% as the grade necessary to entitle an applicant to practice dentistry in the Territory of Hawaii, but they and each of them deny that the petitioner was entitled to a grade of 75% on said examination or that he passed the examination given him by said board in every way and manner provided by said board and the laws of the Territory of Hawaii. They also deny all of the allegations as to prejudice, collusion,

Opinion of the Court.

fraud, etc. The exact language of the answer not being necessary to the discussion is omitted. It is sufficient to say that all of the allegations charging the board and the members thereof with improper conduct are specifically denied.

A trial was thereafter had, the evidence consisting almost entirely of a reexamination by experts of the petitioner's examination papers and practical work done by him as part of the examination. The witnesses were permitted and required over the objection of the respondents to give their opinion as to whether the grades given the petitioner by the board upon his written answers to the questions propounded by the board constituted a proper grading.

At the conclusion of the trial the circuit judge dismissed the alternative writ of mandamus because, as he found from the evidence, the petitioner had failed to show that the action of the respondents in refusing to grant him a license to practice dentistry was manifestly unjust, unfair, malicious, biased, prejudiced and arbitrary. As pointed out by the circuit judge the evidence of experts called in behalf of petitioner is to the effect that many of the answers of the petitioner to questions propounded to him upon said examination upon which the board had given a low mark were full, accurate and correct and entitled to full credit; that others were entitled to a higher credit than given by the board. On the other hand, the experts called in behalf of the respondents have testified that the grading given by the board in almost every instance is all that the petitioner is entitled to upon his answers. There are a few notable exceptions where the experts called in behalf of respondents have said that petitioner's answers entitled him to a higher grade than that given by the board. It is also true that some of the experts called in behalf of respondents have

Opinion of the Court.

pointed out instances where the board gave petitioner a higher grade than his answers warranted.

It is apparent from many rulings of the circuit judge during the progress of the trial that he permitted the examination of the experts upon petitioner's answers to the questions propounded to him by the board on the theory that if the evidence showed that his answers were clearly and manifestly entitled to a higher grade than that given by the board it would tend to establish his charge of prejudice and misconduct on the part of the board and its members against him and consequently its refusal to issue a license to petitioner an abuse of discretion.

From the beginning and throughout the trial the respondents insisted that the board of examiners in passing upon the qualifications of an applicant for a license to practice dentistry must exercise their judgment and discretion and that having exercised it the writ of mandamus will not lie to review their decision. It is elementary that in mandamus proceedings to coerce a judicial officer or any person or board in the exercise of judicial or quasi-judicial power the sole legitimate purpose thereof is to set such person or board in motion; to command him or it to act, to exercise the judicial power vested in him or it; not to control as to the conclusion to be reached. The function of mandamus is to compel the performance of a legal duty, to command action, not to review action. It is the remedy for nonfeasance not for misfeasance. If the board had refused to examine the petitioner after having decided that he possessed the qualifications entitling him to take the examination it could doubtless have been compelled to do so by mandamus, or if having given him the examination there was no reasonable ground to justify a decision by said board other than that he had passed the required grade the

Opinion of the Court.

function of a mandamus proceeding is broad enough to remedy the mischief by compelling the making of such decision in perfect harmony with the rule that the office thereof is not to control discretionary authority but to compel the exercise thereof. That is to say, if the law imposes the duty upon a judicial body to do a particular thing upon determining that certain facts exist and reasonable inquiry be made by it in respect to such facts, and from the information thus obtained there is no reasonable ground for any conclusion other than that the conditions precedent to the performance of such duty exist, and a decision is made to the contrary or performance thereof is refused, such conduct is not the exercise of a discretionary power but a refusal to exercise it,—a refusal or neglect to perform a plain duty imposed by law; and there being no adequate legal remedy the way is open for the extraordinary jurisdiction of the court to award its writ of mandamus. But it is plain that in such a situation the court does not deal with disputed facts. It acts upon the theory that the person or body in duty bound to find the facts in accordance with the evidence, in refusing to do so goes beyond, or refuses to exercise, his or its jurisdiction and is on that ground alone a subject for coercion by mandamus. (*State v. Chittenden*, 88 N. W. 587; *State v. Johnson*, 79 N. W. 1081.)

If the board of dental examiners exercises judicial or quasi-judicial powers in the examination of candidates for licenses to practice dentistry under our statute it is apparent from the principles stated that the only question with which we are concerned is, has the board refused or neglected to exercise its jurisdiction either by refusing to examine the applicant, or having examined him utterly disregarded the duty resting upon it to decide in accordance with undisputed facts. That the board is under our statute clothed with quasi-judicial power we do not think

Opinion of the Court.

can be doubted. Section 1041 R. L. 1915 is as follows: "Any person twenty-one years of age and of good moral character, who has graduated at, and holds a diploma from a reputable college, and who desires to practice dentistry in this Territory, shall file his or her application with and pay to the secretary of the board a fee of twenty dollars which in no case shall be refunded, and present himself or herself for examination at the first meeting of the board after such application, and upon passing an examination satisfactory to the board, his or her name, age, nationality, location and number of years of practice shall be entered in a book kept for that purpose, and a certificate of license to practice shall be issued to such person."

The cases bearing on this question are numerous, a few of which will be examined.

In *Van Vleck v. Board of Dental Examiners*, 48 Pac. 223, from the supreme court of California, the petitioner sought by mandamus to compel the board to issue to him a license and alleged that he is the holder of a diploma regularly issued to him by the American College of Dental Surgery of Chicago, Ill., after a course of study therein and an examination for graduation as prescribed by the regulations thereof; that desiring to practice his profession in the State of California petitioner, on the 10th day of May, 1894, in pursuance of said act, presented to defendants his said diploma and demanded that they indorse the same and issue to him a certificate to that effect; that when said diploma was issued and at the time of the application to defendants said American College of Dental Surgery was a reputable college and there existed and was at the command of defendants sufficient evidence of such facts; that with his application petitioner furnished evidence satisfactory to the defendants that he was the person named in said diploma and that

Opinion of the Court.

the same had been issued to him as stated in said diploma; that defendants without any lawful right or excuse therefor refused to indorse plaintiff's said diploma or to issue to him the certificate provided for in said act. The act referred to after providing for the constitution and organization of the board and for the examination of applicants without diplomas as to their knowledge and skill in dental surgery further provides that "said board shall also indorse as satisfactory diplomas from any reputable dental college when satisfied of the character of such institution upon the holder furnishing evidence satisfactory to the board of his or her right to the same and shall issue certificates to that effect within ten days thereafter." The other provisions of the act were not involved. The defendants demurred to the complaint upon the ground among others that it did not state facts entitling petitioner to the relief sought. Discussing the powers conferred by the California statute the court said: "The powers thus conferred are broad and comprehensive, and in some respects, at least, must in their nature be final. The judgment of the board, for instance, as to the qualifications of an applicant for license by examination, which is largely, if not wholly, discretionary, must of necessity be conclusive. *Keller v. Hewitt*, 109 Cal. 146, 41 Pac. 871. No one would question this. Is the power to pass upon the reputability of a college, or the right of a holder of a diploma, intended to be less discretionary or final? There is nothing in the language of the act conferring the power to indicate it. The requirement is to 'indorse, as satisfactory, diplomas from any reputable dental college, when satisfied of the character of such institution, upon the holder furnishing evidence satisfactory to the board of his or her right to the same.' This implies quite as necessarily the exercise of judgment and discretion as in the examination of an applicant as to his

Opinion of the Court.

fitness. It does not direct the board to act upon the presentation of certain specified evidence prescribed by the statute, but it requires the finding of the facts upon which their action is to be based from evidence which is to be 'satisfactory to the board.' If the statute required that the applicant make a prescribed showing in a particular manner, and that thereupon the board should indorse his certificate, it might with some reason be said that the act was more ministerial than judicial, and that, upon the prescribed showing being made, the board could not refuse to act. Such a case would be within the doctrine of *Wood v. Strother*, 76 Cal. 545, 18 Pac. 766, and *Stockton & V. R. Co. v. City of Stockton*, 51 Cal. 328, relied on by respondent, where the action of the tribunal depended upon a certain event, and, that event being shown to have in fact occurred, the adverse determination of the tribunal whose duty it was to act was held not so far discretionary as to conclude the question; the true test, as held in *Wood v. Strother*, being whether the determination of the tribunal 'is intended by law to be final.' But here the question whether those facts which are to move the action of the board have been shown does not depend upon some specified piece of evidence fixed by the statute, but upon such facts as will satisfy the board. The whole question, in other words, as to the facts, is committed to its discretionary judgment; and that its determination in such a case is conclusive, and not subject to the mandatory control of the courts, there can be no doubt."

In the case of *Eucbank v. Turner*, 46 S. E. 508, from the supreme court of North Carolina, which was an action by an applicant for a license to practice dentistry against the board of examiners to compel it to issue to him a license after having taken an examination before said board, the gist of his complaint is that, "On 19th

Opinion of the Court.

June, 1903, he was examined by the full board and though he, as he avers, showed on such examination that he 'possessed the necessary and required proficiency in the knowledge and practice of dentistry and underwent a satisfactory examination as required by the statute in such case made and provided, as will abundantly appear from an inspection of his examination papers, the said board and the majority of the defendants composing said board unlawfully, unjustly, and arbitrarily and without just cause or reason and abusing the discretion with which they were clothed by the laws of North Carolina refused and yet refuse upon the repeated demands of the plaintiff to issue and grant to him a certificate of proficiency to which he was and is entitled and which it was and is the duty of the defendants to issue and grant.' ” The North Carolina statute provides that “said board shall grant a certificate of proficiency in the knowledge and practice of dentistry to all applicants who shall undergo a satisfactory examination and who shall receive a majority of votes of said board upon such proficiency.” This statute like our own requires the examination to be satisfactory to the board.

The supreme court of North Carolina discussing the character of the board's duty under their statute and the case made by the complaint said: “The lawmaking power having intrusted such examination to the board thus constituted, and required that the examination shall be satisfactory to them, and such requirements being reasonable and in violation of no constitutional provision, the courts cannot intervene and direct the board to issue a certificate to one who the majority of the board have held has not passed a satisfactory examination, because, upon the examination of experts, the court or jury might think the examination of the plaintiff ought to have been satisfactory to the board. That is a matter resting in the con-

Opinion of the Court.

sciences and judgment of the board, under the provisions of the law, and the courts cannot by a mandamus compel them to certify contrary to what they have declared to be the truth. Had the board refused to examine the applicant upon his compliance with the regulations, the court could by mandamus compel them to examine him; but it cannot compel them to issue him a certificate, when the preliminary qualification required by law, that the applicant shall be found proficient and competent by the examining board, is lacking," and further, "The complaint, alleging as ground of misconduct merely the fact that the examination should have been found sufficient by the board, does not state a cause of action authorizing the issuing of a mandamus. *People v. Dental Examiners*, 110 Ill. 180; *Dental Examiners v. People*, 123 Ill. 227; 13 N. E. 201; *Williams v. Dental Examiners*, 93 Tenn. 619, 27 S. W. 1019, and cases therein cited at page 628, 93 Tenn., 27 S. W. 1019; *State v. Coleman*, 64 Ohio St. 377, 60 N. E. 568, 55 L. R. A. 105. Mandamus cannot be used as a writ of error to revise and reverse erroneous judgments of a subordinate tribunal (in that case, a board of health), and the court 'will not and cannot look into the evidence of fact upon which the judgment of the board was based, for the purpose of determining whether the conclusions drawn from it were correctly or incorrectly formed.' *Kirchgessner v. Board of Health*, 53 N. J. Law, 594, 22 Atl. 226."

Other phases of such a case as is here presented are discussed in the case of *Kenney v. State Board of Dentistry*, 59 Atl. 932, by the supreme court of Rhode Island, where it is said: "Again for us to assume the right to pass upon the qualifications of the petitioner upon evidence to be presented, as she practically asks us to do, and to order the board to issue a certificate in case we find her qualified to practice dentistry, would be to con-

Opinion of the Court.

stitute ourselves a board of dentistry in place of the one created by statute. But we have neither the disposition nor the power to usurp the functions of that body. * * * As to the allegation to the effect that the board is prejudiced against the petitioner, and has not given her a fair and impartial examination, it is sufficient to reply that this court can take no notice of such a charge in a proceeding of this sort. If she was rejected because of improper motives on the part of the board, her remedy is by an action for damages against the individual members thereof, alleging bad faith, and arbitrary disregard of their duties, or improper animus against the appellant, or other malversation in their discharge of duty, but not by mandamus. * * * In short, jurisdiction in a case of this sort does not depend upon the manner in which the board has discharged its duties in matters where it is called upon to exercise judgment and discretion, but it depends upon whether there has been an absolute refusal to perform either a ministerial or a judicial duty. Here the complaint is, not that the board has failed to perform a ministerial duty, but that it has performed a judicial duty in an unfair and arbitrary manner, whereby the petitioner has been unjustly deprived of her rights. For such a wrong mandamus is not the remedy."

From what has been said it is clear that where the statute requires the applicant to pass an examination satisfactory to the board as does our statute and the license is refused because the examination is not satisfactory mandamus is not the proper remedy unless it appears that the opposite conclusion is the only one that could have been honestly reached, for the reason that the board in passing upon the question must exercise judgment and discretion and while mandamus will lie to compel the exercise of discretion it will not lie to control discretion.

Opinion of the Court.

But the petitioner insists that the board having determined in advance that a grade of 75% is all that will be required of an applicant the court must hear evidence and determine therefrom whether he is entitled on his examination to a grade of 75% or over and if found to be so entitled to compel the issuance of a license by mandamus. His contention is that the board in fixing the percentage to be required exhausted its discretion and the further duty resting upon it to properly grade the examination papers is purely ministerial. In support of this contention he relies upon the Texas case of *Dean v. Campbell*, reported in 59 S. W. 294. That was an action for mandamus against the board of pharmaceutical examiners to compel it to issue to the petitioner a certificate to follow the business of a pharmacist. The petition alleged in part, "(1) That petitioner was an applicant before said defendants, as a board of pharmacy for the twenty-sixth judicial district, to be examined by them for the purpose of being granted a certificate to follow the business and occupation of a practical pharmacist; the said applicant to be (and was by said board in its official capacity) examined on the 17th day of November, A. D. 1899, and by said board examined as to such. (2) That the rules and requirements of said board were that if, upon examination by said board, the applicant made in the three branches of said science of pharmacy, altogether, a standing rate of 195 in a possible maximum of 300, the applicant would be granted a certificate that he was a qualified pharmacist, to practice pharmacy in accordance with the act of the legislature of Texas approved on the 6th day of April, 1889; that petitioner, before standing said examination, was told this, and it was the agreement and understanding between him and said board when he stood the same that it was to be the basis and ground upon which he was to obtain his certifi-

Opinion of the Court.

cate, and was the basis and ground upon which all applicants obtained their certificates, being the rule of conduct of said board in that regard. (3) That on the said day and date petitioner appeared before said board and submitted to said examination, and was by said board completely, fully, carefully, and, so far as he knows, correctly and thoroughly, examined by said board as to his qualifications as a pharmacist, and until they were satisfied and sought to examine him no further, and that, as a result of said examination, petitioner by them was given as a mark, grade and standing 200 in said possible 300, as the maximum mark upon which said board conducted said examination, and was thereby, on account of such, entitled to be granted by said board the certificate as a qualified pharmacist under said act approved the 6th day of April, 1889, as aforesaid." A general demurrer to the petition was sustained and the petitioner appealed. After stating the case as made by the pleading and the action of the court on the demurrer the court say: "We are of the opinion that, if the averments of the petition are true, the plaintiff is entitled to the writ of mandamus. The court is lacking in power to control the discretion of the board of examiners, but the averments in the petition reach beyond the point of discretion, and are to the effect that the plaintiff passed the requisite examination according to the standard prescribed by the board, and that he was adjudged by the board as entitled to his certificate, but that they wilfully and maliciously refused to issue it to him. If as a fact in his examination he stood the test required by the board, and it was by them determined that he was entitled to his certificate, the issuance of the certificate then becomes a ministerial act, and the wilful failure and refusal to issue it would be a wrong perpetrated upon the plaintiff, for which his remedy would lie as prayed for. We have

Opinion of the Court.

examined the statutes and the decisions on the question of jurisdiction of the trial court in actions of this character, and the conclusion reached is that, if the proper case is made by the petition, the district court has jurisdiction to issue its mandamus to require the board of examiners to perform a ministerial duty."

This makes a very different case from the one at bar for the reason that in that case it is alleged that the board of examiners found that the petitioner had made a grade higher than that previously determined to be sufficient while in the case at bar the board found that the petitioner had not made the required grade. The case is therefore not authority for the petitioner's contention.

The case of *Keller v. Hewitt*, from the supreme court of California (41 Pac. 871), is to the same effect as the Texas case of *Dean v. Campbell*, *supra*, and the difference between them and a case where the board has found that the applicant did not pass the required grade is clearly pointed out by the California court in the following language: "The case of *Bailey v. Ewart*, 52 Iowa 111, 2 N. W. 1009, largely relied upon by respondents as supporting their view, we do not regard as in point or as in any way in conflict with the principles above announced. It is apparent from the reading of that case that the certificate was there refused because the applicant was not found qualified; and it was properly held under the general rule above stated that this question was a discretionary one and could not be reviewed. A very different question would have been presented had the applicant been found competent and the certificate then refused. Had the court reached the conclusion it did under such a state of facts the case would have presented some analogy to the one before us."

The only case we have found which involves the

Opinion of the Court.

question of the effect of a rule or statute fixing the grade that will be required is the case of *Raaf v. State Board of Medical Examiners*, 84 Pac. 33, from the supreme court of Idaho. The Idaho statute provides that "the board shall cause the examination to be scientific and practical and sufficiently thorough to test the applicant's fitness to practice medicine and surgery or either of them and if the applicant correctly answer at least 75 per cent. of all the questions submitted, said board shall grant the applicant a license to practice medicine and surgery in this state." The Idaho statute also provides that "In case the board refuse to grant a license to practice under this act, the applicant shall have the right to have the action of the board refusing such license reviewed by the district court in and for the county in which the meeting at which the license was refused was held or such other county as may be agreed upon." Notwithstanding these provisions of the statute the court in the case of *Raaf v. State Board of Medical Examiners, supra*, held that "A careful examination of the powers and authority granted the board will at once disclose the fact that it is called upon to exercise judgment and discretion in every instance where an application is made for a license on examination. It is the duty of the board first to determine whether or not the applicant is the bona fide holder of a diploma issued from a reputable medical college in good standing. It is their duty to determine whether or not the applicant is a person of good moral character. It is also their duty to examine his answers to the questions propounded and determine whether or not he has 'correctly answered at least seventy-five per cent. of all the questions submitted' to him. These are questions of fact to be determined by the board. There are no set, fixed or inviolable rules by which such a board must determine whether a question has been answered correctly or incorrectly. Knowl-

Opinion of the Court.

edge must be brought to bear and judgment must be exercised. The science of medicine is not such an exact and immutable science but that those who are eminent and learned in the profession often differ in a diagnosis or as to what would be an absolutely correct answer to a given question. It is a progressive science. This is one of the chief considerations for requiring such examinations to be conducted by those who are proficient and learned in the profession. The powers and authority to be exercised by various boards of this character has been frequently considered by the courts, and it has been generally held that they exercise discretionary and quasi judicial functions."

From the cases which we have reviewed, other than the Wisconsin cases above cited, it is apparent that they do not go as far as we have in holding that the refusal of a judicial body or a person or board exercising judicial or quasi-judicial powers to find the facts in accordance with undisputed evidence amounts to a refusal by such person or body to act and may, where there is no legal remedy, be coerced by mandamus to find the facts in accordance with the undisputed evidence, but we think the rule laid down in the Wisconsin cases represents the more enlightened view and should be adopted although the contrary view is supported by the greater number of judicial decisions.

In Montana where the statute provides that "In cases of the refusal or revocation of a certificate to practice medicine by the said board the person aggrieved thereby may appeal from the decision of the board to the district court of the county in which such revocation or refusal is made" it is held as a matter of course that the court must, where the certificate is refused on the ground that the applicant has failed in his examination and he appeals, determine the question of whether he in fact

Opinion of the Court.

failed but it is said that a court will be slow to reach a conclusion different from the finding of the board as to an applicant's competency to practice medicine where satisfactory evidence sustaining the board's opinion is presented and where no willful wrong or prejudice is charged against the board or any of its members by the rejected candidate. But it must be apparent that the Montana case is not authority here for the reason that there the statute provides for an appeal to the court from the decision of the board which is not the case in this jurisdiction, and mandamus cannot be made to take the place of an appeal or writ of error. (*Ewbank v. Turner, supra.*)

We must therefore conclude that the fixing of a percentage which the candidate would be required to make before receiving a license did not render the board's duties ministerial. It cannot therefore be coerced by mandamus to issue the license unless its action in refusing to do so comes within the rule heretofore announced. Very slight, if any, evidence is to be found in the record tending to establish the charges of prejudice and misconduct on the part of the members of the board. In fact the petitioner seems to rely almost entirely on his claim that a fair grading of his answers and practical work would entitle him to a rating in excess of 75% and therefore to his license. As has already been observed the experts called in behalf of respondents have testified that the grading of the board is fair and all that the answers given by the petitioner entitle him to. The grade given by the board averaged less than 60% and while the evidence given by the experts called in behalf of the petitioner is to the effect that his answers entitle him to a grade in excess of 75% we are not called upon in this proceeding to determine which view is entitled to the most weight. Unless the evidence showed that no other

Opinion of the Court.

conclusion than that the answers entitled him to a passing grade could have been honestly reached we are without power to compel the board by mandamus to so decide and issue the license.

For the reasons herein set forth the decree appealed from is affirmed.

W. B. Pittman (*Andrews, Pittman & O'Brien* on the brief) for petitioner.

J. Lightfoot, Deputy Attorney General, for respondents.

OLIVER A. JEFFREYS *v.* T. KONNO AND
YURIKO KONNO.

No. 1247.

APPEAL FROM CIRCUIT JUDGE THIRD CIRCUIT.

HON. J. W. THOMPSON, JUDGE.

ARGUED APRIL 20, 1920.

DECIDED MAY 11, 1920.

COKE, C. J., KEMP AND EDINGS, JJ.

OPINION OF THE COURT BY COKE, C. J.

This is a suit in equity to compel the specific performance of a contract. The respondents T. Konno and Yuriko Konno are husband and wife. The complainant Oliver A. Jeffreys was the owner of a four-acre tract of land known as the Goodhue lot in the district of North Kona, Hawaii. This lot is a portion of an $8\frac{4}{10}$ acre tract. It was the desire of the complainant to purchase the remaining portion of the property, to wit, $4\frac{4}{10}$ acres, as well as a lot containing $5\frac{7}{10}$ acres which

Opinion of the Court.

adjoined the 8 4/10 acre lot on the mauka side and lay between it and the government road. The property which complainant desired to acquire contained in all 10 1/10 acres of land. The property at the time was owned by the Lunalilo Estate but the respondent T. Konno held an option to purchase it from the owner. The complainant entered into negotiations with representatives of the Lunalilo Estate to acquire the property but in the mean time respondent Konno exercised his option to purchase, and became the owner, of the property. Complainant thereafter carried on his negotiations with Konno. The complainant in company with Konno, Wm. M. McQuaid and Mr. Muller, a surveyor, went upon the property, viewed it and traced the boundaries. A sketch or map thereof was made by Mr. Muller. Thereafter the respondent Konno transmitted to Jeffreys a letter, reading as follows:

“Holualoa in Kona, Hawaii, December 11, 1918.

“Dr. O. A. Jeffreys,

“Holualoa, Hawaii.

“Dear Sir:

“We are willing to let you have the piece of land as surveyed by Mr. Muller and inspected by you, Mr. McQuaid and myself on December 5, for the sum of \$350. If this meets with your approval we would ask you to notify the Guardian Trust Co. to that effect and as soon as we have perfected our arrangements with them we will convey to you title to this piece of land.

“Yours very truly,

(Sgd) “Kona Development Company,

“By T. Konno.”

Mr. Konno was the manager and Mr. McQuaid the assistant manager of the Kona Development Company. The company as a matter of fact was not interested in the property; it was owned personally by Mr. Konno. On December 24, 1918, Mr. McQuaid notified Jeffreys by

Opinion of the Court.

letter that the deed to the land which he was purchasing from Konno would be sent to him and directed him to transmit the purchase price, to wit, the sum of \$350, to him or to Messrs. Castle & Withington, Konno's attorneys at Honolulu. The money was then sent to Mr. McQuaid and shortly thereafter a quitclaim deed was executed by Konno and his wife to the complainant and transmitted to complainant by mail. This deed quitclaimed unto Jeffreys, his heirs and assigns, the grantors' interest in a lot containing $8\frac{40}{100}$ acres, a part of which, as already mentioned, was at the time owned by complainant. The deed did not include the lot containing $5\frac{7}{10}$ acres adjoining the government road. The purpose of this suit is to compel a conveyance by a good and sufficient deed conveying a fee simple title in and to the $10\frac{1}{10}$ acres of land which was viewed by the parties, surveyed by Mr. Muller, and which, it is claimed by the complainant, was the property referred to in the letter of Mr. Konno dated December 11, 1918. The cause was tried before the circuit judge of the third judicial circuit sitting in equity and a decree was entered in accordance with the prayer of the bill of complaint. From the decree the respondents have perfected an appeal to this court.

The errors alleged by the respondents are:

"1st. McQuaid was the complainant's agent and he was bound by McQuaid's acts in accepting the deed for 4.4 acres.

"2d. It is grossly inequitable to compel the defendant to make a conveyance when an admitted mistake has been made and the defendant has offered to return the purchase money, and there is testimony that the land is worth \$250 an acre.

"3d. There is error to enforce a contract between Jeffreys and the Kona Development Co., Ltd., when at

Opinion of the Court.

the time of the execution of the contract neither the Kona Development Co., Ltd., or Konno owned the land in controversy, and the contract was made under a mistake both as to person and land.

"4th. The evidence of offers of compromise objected to by the defendants was inadmissible."

Jeffreys testified that he had a talk with McQuaid and asked him if he could set a price on the land. McQuaid replying that he could not do so until they had inspected the property. Shortly thereafter Konno and McQuaid together with Jeffreys and Muller inspected the property and in a short time thereafter he received the letter from Konno offering to sell the property for \$350. McQuaid says he drafted the letter. Konno and McQuaid were associated in business together, the one as manager and the other as assistant manager of the Kona Development Company, Limited, and we think it was sufficiently established upon the trial that McQuaid was throughout the transaction acting for Konno and was not the agent of Jeffreys.

There is no merit in the second error alleged. There is some evidence that the property is worth \$250 an acre. There is other evidence that the property is worth only \$35 per acre. This being the state of the record there was clearly no showing of a grossly inadequate consideration.

The third error alleged is technical in the extreme. It is based upon the fact that the letter directed to Jeffreys was signed by the Kona Development Company, Limited, by T. Konno. T. Konno owned the controlling interest in the Kona Development Company and was its general manager. Their interests were so interwoven it is not surprising that there was a confusion in the use of their names in the correspondence which passed between the parties. All doubt as to who was the real party making the offer of sale contained in the letter is cleared

. Opinion of the Court.

away by the testimony of Mr. Konno in his statement on the witness stand to the effect that at the time he signed the letter he was busy with other matters and carelessly signed the letter in favor of the company but it was his personal dealings.

The fourth specification of error is equally without merit. While it is not made entirely clear we assume the objection is to the letters which passed between the parties after the deed was delivered to the complainant and which letters were introduced in evidence by complainant. Upon receipt of the deed complainant discovered that it only conveyed a portion of the property which Konno agreed to sell to him. He thereupon communicated with Konno calling his attention to the oversight and finally offered to arbitrate the matter. Konno replied by declining to settle by arbitration but signified his willingness to return the purchase money to complainant if a quitclaim deed to the property was made to him. These communications merely amount to a demand for a rectification of the deed on one side and a refusal to acquiesce therein on the other, thus laying the basis for these proceedings which were subsequently instituted by the complainant.

The respondent Konno offered in writing to sell to complainant 10 1/10 acres of land and this offer was in good faith accepted by complainant who paid to Konno the purchase price mentioned in the offer of sale. The delivery to complainant of a quitclaim deed to 4 1/10 acres fell far short of a compliance with the terms of the agreement. The complainant is entitled to a deed conveying a fee simple title in and to the 10 1/10 acre tract which is delineated on the Muller map.

The decree appealed from is affirmed.

H. G. Middleditch for complainant.

A. Withington (Robertson, Castle & Olson on the brief) for respondents.

Syllabus.

HANNAH MAKAINAI *v.* SOLOMON K. LALAKEA.

No. 1257.

EXCEPTIONS FROM CIRCUIT COURT FOURTH CIRCUIT.

HON. C. K. QUINN, JUDGE.

ARGUED MAY 12, 1920.

DECIDED MAY 19, 1920

COKE, C. J., KEMP, J., AND CIRCUIT JUDGE BANKS
IN PLACE OF EDINGS, J., ABSENT.

TRIAL—*nonsuit*.

This court will not disturb the ruling of a circuit judge denying defendant's motion for a nonsuit at the close of plaintiff's evidence in rebuttal in a jury-waived trial if the evidence would have justified submitting the questions of fact to a jury.

SAME—*same*.

To authorize the court to take the question from the jury the evidence must be of such a character that there is no room for ordinary minds to differ as to the conclusion to be drawn from it.

EVIDENCE—*sufficiency*.

A mere scintilla of evidence is insufficient to support a finding of fact and to amount to more than a mere scintilla the evidence must be of a character sufficiently substantial in view of all the circumstances of the case to warrant the jury (or judge) as trier of the facts in finding from it the fact to establish which the evidence was introduced.

OPINION OF THE COURT BY KEMP, J.

This is an action in ejectment by Hannah Makainai against her brother Solomon K. Lalakea to recover from him the land described in her complaint and damages for its retention. The defendant answered by general denial and the cause came to trial before the circuit judge jury waived. At the beginning of the trial and before any evidence was introduced a stipulation was entered into by the parties in open court as to certain

Opinion of the Court.

facts which were stated by the attorney for the defendant in substantially the following language: We admit that T. K. Lalakea mentioned in the declaration was in his life time and prior to the execution or alleged execution, or prior to the date of a certain deed dated March 6, 1915, which will be offered in evidence by defendant, seized of the pieces of land named in the declaration; that T. K. Lalakea died intestate on the 7th day of May, 1915; that Hannah Makainai was an heir at law of T. K. Lalakea, deceased. These stipulations are subject to an agreement by counsel that we may offer in evidence, and that there will be no objection to accepting in evidence, a certain deed purporting to be executed by T. K. Lalakea to Solomon K. Lalakea, bearing date March 6, 1915, and, according to the office of the registrar of conveyances in Honolulu, entered upon the 11th day of May, 1915, in liber 428, pages 122-127; and that that deed shall be considered by them as constituting a *prima facie* case upon the part of the defendant. This statement of the stipulation was agreed to by the attorney for the plaintiff with the further statement that the stipulation should contain the fact that the defendant is in possession of the land, which was agreed to by the attorney for the defendant. With this stipulation the plaintiff rested and with the introduction in evidence of the deed referred to defendant also rested. The plaintiff thereupon introduced certain evidence for the purpose of rebutting the validity of the deed introduced in evidence by the defendant, the evidence offered being directed to the questions of whether or not the deed in question was ever delivered to the defendant by T. K. Lalakea in his lifetime and whether or not the signature to said deed was in fact the signature of said T. K. Lalakea. It was then further stipulated that if the plaintiff is entitled to recover she is entitled to an

Opinion of the Court.

undivided one-eighth interest in the land in question. Plaintiff having introduced her evidence on these issues again rested and the defendant moved for a nonsuit upon the following grounds: (1) That the plaintiff has not presented any evidence herein in support of her declaration; (2) that the plaintiff has not introduced evidence sufficient to entitle her to a judgment by this court in her favor; (3) that the plaintiff has failed to sustain all the necessary allegations in her declaration.

- The motion for nonsuit was overruled, to which ruling an exception was taken by counsel for the defendant. Defendant was thereupon at his request granted an interlocutory bill of exceptions which was transmitted to this court.

The interlocutory bill of exceptions presents only one exception for the consideration of this court at this time, namely, the exception to the overruling of the motion for a nonsuit. This involves of course an examination of the evidence introduced by the plaintiff to substantiate her claim that the deed was never executed by her father T. K. Lalakea, and if executed was never delivered to the defendant.

The deed mentioned in the stipulation and introduced in evidence by defendant bears date March 6, 1915. It purports to have been executed by T. K. Lalakea and is witnessed by D. Namahoe, and Solomon K. Lalakea the grantee therein named. This deed was not proven for record in the lifetime of the grantor but on May 8, 1915, the day following the grantor's death, the subscribing witnesses appeared before the circuit judge at Hilo, produced said deed and made proof of its execution in the manner required by the statute. With the circuit judge's certificate of proof attached said deed was immediately forwarded by the defendant to Honolulu to the registrar of conveyances and entered of record on May

Opinion of the Court.

11, as stated in the stipulation. This made a *prima facie* case for the defendant both as to the execution and the delivery of the deed and placed the burden of going forward with the evidence as to these issues on the plaintiff. What then was the evidence produced by the plaintiff to overcome the *prima facie* case made by the defendant?

To begin with, in December, 1914, T. K. Lalakea had his attorney, Mr. O. T. Shipman, draft about a half dozen deeds among which was the deed in question. The other deeds were to various other of his children and if all had been executed and delivered would have disposed of all, or practically all, of his large and valuable estate. By far the greater part of his valuable lands were included in the deed to his son Solomon, the defendant herein. Mr. Shipman was at that time, and had been for a period of four or more years the regular legal adviser of Lalakea senior and was a notary public. Lalakea habitually went to Mr. Shipman to have his conveyancing done and to have his acknowledgments taken. It appears that after drafting these deeds Mr. Shipman delivered them to his client and at various times thereafter had conversations with him about the execution thereof, the last of which was about April 20, 1915. It is significant that one of these conversations took place on the 6th of March, the very day that the deeds purport to have been executed. What these conversations were the witness was not permitted to say. One of the other deeds drawn by Mr. Shipman at the same time he drew the deed in question was to the plaintiff and two of her sisters jointly. It is admitted that this deed was not delivered to the plaintiff personally by her father, but like the deed in question was proven for record by the same subscribing witnesses before the circuit judge on the day following the death of the grantor, and by the defendant sent to Honolulu for record. One of the other

Opinion of the Court.

grantees named in the deed to the plaintiff has also testified that it was never delivered to her but that some two years after it was recorded was sent to her by defendant. Mr. Shipman has testified that about ten minutes before he heard of the death of Lalakea senior the defendant came to his office "in a big fuss and wanted me to go right over to Lalakea's residence, stating that he was in pilikia, in a bad way, and wanted me to go over right away and go over to see about these deeds—these half a dozen deeds I had originally drafted and delivered to T. K. Lalakea. I asked him if Mr. Lalakea was conscious to know what he was doing. He did not think he was. Solomon didn't think he was really conscious. I said it is no use for me to go, I could not do anything for you. It is too late." Mr. Shipman was unable to state whether the defendant stated that he wanted him to have the old man sign and take his acknowledgment or simply to take his acknowledgment, but he states positively that he wanted acknowledgments taken in connection with the deeds mentioned. It also appears from the evidence of the plaintiff and her sister Mrs. Hewahewa that within one hour after the death of their father the defendant went into the room of their father's residence formerly occupied by him, unlocked the drawers of his bureau and took therefrom a bundle of papers, wrapped them in a towel and left the house. They state in effect that this bureau was at all times kept locked by their father in his lifetime and in it he kept his papers, money, etc.; that for a short time prior to their father's death their brother Solomon had been looking after their father's business and during that time carried the key to said bureau, but that he (Solomon) kept his papers in another room in a writing desk. They did not attempt to say that the papers taken from the bureau by Solomon at this time

Opinion of the Court.

included the deed in question but they both described the papers as being part white and part blue, which description corresponds with the deeds to the defendant and various other children, three of which are exhibits in this case. Then we have the further fact that on the day following the death of their father the son Solomon produced the deed to himself and the deeds to the other children before the circuit judge and had them proved for record and sent them to the registrar of conveyances for record without consulting any of the other grantees who have so far testified in this case. In addition to this line of testimony showing the actions of the defendant just before and just after his father's death three witnesses who knew the deceased well for a number of years before his death and who were familiar with his signature have testified just as positively as any witness could who gives his opinion that in their opinion the signature to the deed relied upon by the defendant is not the signature of T. K. Lalakea. These witnesses were thoroughly cross-examined on this branch of their testimony and each supported his opinion by as good reasons as could be expected in a matter of this kind. There were also produced several admitted genuine signatures of T. K. Lalakea which the witnesses compared with the signature to defendant's deed and pointed out points of difference. The circuit judge was also at liberty to make his own comparisons between the genuine signatures and the signature to the deed in question.

The defendant makes two contentions as to the sufficiency of the plaintiff's evidence to support her claims: (1) That the evidence as to the nondelivery of the deed to the defendant merely raises a suspicion and is not legally sufficient to support a finding that the deed was never delivered; (2) that opinion evidence is not legally sufficient to overcome the direct testimony of the sub-

Opinion of the Court.

scribing witness attached to the deed that it was executed and delivered in his presence.

It is important before proceeding to an application of the evidence to determine the rule of law by which the circuit judge is to be governed in ruling upon a motion for a nonsuit. It has been held many times by this court that a mere scintilla of evidence is insufficient to support a finding of fact and that to amount to more than a mere scintilla the evidence must be of a character sufficiently substantial in view of all the circumstances of the case to warrant the jury (or judge) as trier of the facts in finding from it the fact to establish which the evidence was introduced. (*Holstein v. Benedict*, 22 Haw. 441.) The circuit judge having overruled the motion for a nonsuit we are in the same position and must be governed by the same rules of law as would govern had the case been submitted to a jury for determination upon the facts, that is, if the court would have been justified in submitting the questions of fact to a jury the circuit judge's ruling will not be disturbed. The supreme court of Texas in *Lee v. Ry. Co.*, 89 Tex. 588 (36 S. W. 65), said: "To authorize the court to take the question from the jury the evidence must be of such character that there is no room for ordinary minds to differ as to the conclusion to be drawn from it." In *Mynning v. R. R. Co.*, 64 Mich. 93 (31 N. W. 147), the rule is stated thus: "If the circumstances are such that reasonable minds might draw different conclusions respecting the plaintiff's fault he is entitled to go to the jury upon the facts. The judge takes the case from the jury only when it is susceptible of but one just opinion." These cases are quoted with approval in *Joske v. Irvine*, 44 S. W. 1059, one of the cases upon which the defendant in this case strongly relies.

From a careful examination of the cases it appears

Opinion of the Court.

that it is the duty of the court to instruct a verdict though there be slight testimony if its probative force be so weak that it only raises a mere surmise or suspicion of the existence of the facts sought to be established. Such testimony in legal contemplation falls short of being any evidence. But it is the duty of the court to determine whether the testimony has more than that degree of probative force and if the court determines that it has the law presumes that the jury could reasonably infer therefrom the existence of the alleged fact.

We are then called upon to determine whether the testimony in this case does more than create a mere surmise or suspicion that T. K. Lalakea never delivered the deed in question to the defendant. We think that it does. It shows clearly that within a few minutes of the death of his father the defendant was seeking the aid of an attorney and notary public to have the deed acknowledged by his father; that within a very short time after his father's death he went into the room occupied by his father prior to his death and took therefrom papers which it might be inferred included the deed in question; it also shows that several other deeds were made by the same grantor at the same time, under the same circumstances, conveying other property to the defendant's brothers and sisters and that these deeds, or at least some of them, were never delivered. The evidence as to the genuineness of the grantor's signature is not without bearing upon this issue. If as might be found from the evidence of the three witnesses to which we have referred the deed was never executed by T. K. Lalakea this fact would have a strong bearing upon the question of the delivery or nondelivery of the deed.

On the question of whether or not opinion evidence is legally sufficient to overcome the testimony of the subscribing witness attached to the deed defendant relies

Opinion of the Court.

largely upon the case of *Mut. Ben. Life Ins. Co. v. Brown*, 32 N. J. E. 809, and the vice chancellor's opinion in the same case reported in 30 N. J. E. 193. The vice chancellor's decision is particularly relied upon for the contention of the defendant that the proof that the signature is not T. K. Lalakea's does not join an issue as to the execution of the deed in question because, as he says, the deed could have been signed by the hand of a third person at the request of the grantor and still have been his free act and deed. Whether this is true or not we need not decide as under the facts so far presented in this case the question of the validity of such a signature is not presented. The certificate attached to the deed in question recites that the subscribing witness testified that he saw T. K. Lalakea voluntarily sign and deliver the same. Until it is made to appear in some manner that the deed in question was signed by some one other than the grantor at his request we must assume that the defendant's claim is that the grantor himself signed it. It is apparent from a reading of the opinion of the full court in the case last above cited that it took that view of that case.

We think that if the opinion evidence in this case is sufficient to establish the fact that the signature attached to the deed in question is not the signature of T. K. Lalakea the circuit judge would be justified in finding that T. K. Lalakea never executed the deed. As said by Jones in his *Commentaries on Evidence*, Vol. 3, p. 597. "This kind of testimony may be so weak as to be unsafe to act upon, or so strong as, in the mind of every reasonable man, to produce conviction. But whatever degree of weight his testimony may deserve, which is a question exclusively for the jury, it is an established rule that, if one has seen the person write, he will be competent to speak as to such handwriting." The opinion

Syllabus.

evidence in this case is as strong and positive as opinion evidence could well be that the signature to the deed is not the signature of T. K. Lalakea and would justify the circuit judge in finding as a fact that the deed was not executed by T. K. Lalakea.

Our conclusion is that the plaintiff has produced substantial testimony tending to establish both that the deed in question was never delivered and that it was not executed by the alleged grantor. The circuit judge therefore committed no error in denying the motion for a nonsuit and the exception thereto must be and is overruled.

J. W. Russell (*J. Lightfoot* and *Russell & Patterson* on the brief) for plaintiff.

W. H. Smith (*W. S. Wise* with him on the brief) for defendant.

JOHN F. COLBURN v. UNITED STATES FIDELITY
AND GUARANTY COMPANY.

No. 1227.

SUGGESTION OF DEATH OF PLAINTIFF AND MOTION BY HIS
EXECUTORS FOR SUBSTITUTION.

ARGUED MAY 15, 1920.

DECIDED MAY 20, 1920.

COKE, C. J., KEMP, J., AND CIRCUIT JUDGE BANKS
IN PLACE OF EDINGS, J., ABSENT.

PARTIES—*substitution of personal representative for deceased plaintiff.*

When the plaintiff recovers judgment below and the case is pending in this court on appeal and plaintiff dies, upon the suggestion of his death by his personal representative said personal representative will be substituted for the deceased plaintiff.

Opinion of the Court.

OPINION OF THE COURT BY KEMP, J.

This case is brought to this court on a bill of exceptions by the defendant United States Fidelity and Guaranty Company, a corporation, after judgment in favor of the plaintiff John F. Colburn and against the said defendant. The judgment in favor of the plaintiff is for damages sustained by reason of accidental injuries suffered by him and covered, as is claimed, by an accident insurance policy issued by the defendant company. The bill of exceptions was approved by the circuit judge on September 29, 1919, and the record filed in this court on October 16, 1919. On May 11, 1920, John F. Colburn III and Richard H. Trent, the executors under the last will and testament of John F. Colburn, deceased, filed in this court a suggestion of the death of the plaintiff-appellee and requested an order substituting themselves in his place and stead. The affidavit attached to the motion shows that the plaintiff-appellee died March 16, 1920, and that they (the movants) were on May 3, 1920, appointed executors of his estate under his last will and testament which was duly admitted to probate in the circuit court of the first judicial circuit on May 3, 1920. Section 2628 R. L. 1915 provides: "In case of the death of a sole plaintiff or sole surviving plaintiff, the legal representative of such plaintiff may, by leave of the court or judge, enter a suggestion of the death and that he is such legal representative, and the action shall thereupon proceed; and if such suggestion be made before the trial, the truth of the suggestion shall be tried thereat, together with the title of the deceased plaintiff; and such judgment shall follow upon the verdict in favor of or against the person making such suggestion as if such person were originally the plaintiff." Section 2630 R. L. 1915 is in part as follows: "The death of either party between the verdict and the judgment shall not hereafter

Opinion of the Court.

be alleged for error, if judgment be entered during the term in which such verdict was rendered, and if the plaintiff in any action happen to die after an interlocutory judgment and before a final judgment obtained therein, the said action shall not abate by reason thereof, if such action might be originally prosecuted or maintained by the executor or administrator of such plaintiff."

The statute makes no provision for procedure where a case has proceeded to final judgment and has been removed to this court upon appeal but it seems clear to us that in such a case where the plaintiff dies after the case is entered in this court the personal representative of the deceased plaintiff (or his heirs where they instead of the personal representative would succeed to his rights) should be permitted to appear in his stead. As a precedent for this holding we cite *Coughlin v. District of Columbia*, 106 U. S. 7, which was originally before that court as *Dant v. District of Columbia*, and reported in 91 U. S. 557, in which judgment below was in favor of the defendant and plaintiff brought the case to the United States Supreme Court on writ of error. After the case was entered in the Supreme Court the plaintiff died and the action was prosecuted by his administrator and his name substituted for that of the original plaintiff.

The motion should we think be granted and it is so ordered.

R. J. O'Brien for movants.

W. B. Lymer for defendant.

Opinion of the Court.

JOHN F. COLBURN *v.* ALFRED W. CARTER AND
JOHN C. LANE.

No. 1258.

SUGGESTION OF DEATH OF PLAINTIFF AND MOTION BY HIS
EXECUTORS FOR SUBSTITUTION.

ARGUED MAY 15, 1920.

DECIDED MAY 20, 1920.

COKE, C. J., KEMP, J., AND CIRCUIT JUDGE BANKS
IN PLACE OF EDINGS, J., ABSENT.

OPINION OF THE COURT BY KEMP, J.

This motion is in all respects similar to the one in *Colburn v. U. S. Fidelity and Guaranty Company* (ante p. 479) and the facts are the same except that judgment below in this case was in favor of defendants and plaintiff brought the case here on bill of exceptions and died after the case was entered in this court.

If this suit is one which the executors could have originally prosecuted or maintained there would appear to be no difference between it and *Colburn v. U. S. Fidelity and Guaranty Company*. Since the question of whether or not this is a case which the executors could have originally prosecuted or maintained has not been presented we will for the purpose of this opinion assume that it is and allow the motion subject to the right of defendants to present that question if they so desire when the case is heard on the merits.

R. J. O'Brien for movants.

W. B. Lymer for defendants.

Syllabus.

A. L. MOSES, SURVIVING PARTNER OF THE CO-PARTNERSHIP OF E. W. BARNARD AND A. L. MOSES, HERETOFORE CARRIED ON UNDER THE FIRM NAME AND STYLE OF E. W. BARNARD, v. ANTONE NOBRIGA.

No. 1261.

EXCEPTIONS FROM CIRCUIT COURT FOURTH CIRCUIT.

HON. C. K. QUINN, JUDGE.

ARGUED MAY 12, 1920.

DECIDED MAY 25, 1920.

COKE, C. J., KEMP, J., AND CIRCUIT JUDGE BANKS
IN PLACE OF EDINGS, J., ABSENT.

TRIAL—*findings of fact—credibility of witnesses.*

Issues concerning the credibility of witnesses and the weight of the evidence are to be determined by the trial court and the findings cannot be disturbed if supported by evidence.

ATTACHMENT—*motion to dissolve—exemption of property levied on as ground.*

It is not a sufficient ground for dissolving a writ of attachment that the property levied upon is exempt from seizure under the writ.

OPINION OF THE COURT BY KEMP, J.

This cause comes here on defendant's bill of exceptions. The plaintiff brought his suit in assumpsit to recover of defendant \$1475.76. The defendant answered by general denial and pleaded a set-off for the sum of \$682.90. The plaintiff answering defendant's set-off entered a general denial and the additional defense of the statute of limitations. The complaint was filed June 21, 1918, and the set-off was filed October 31, 1918. At the trial (jury waived) the defendant admitted liability under the first count of plaintiff's declaration in the sum

Opinion of the Court.

of \$1475.76 and the trial of defendant's set-off was had after which the circuit judge found against the defendant on all of his claim except two items aggregating \$6.50. Judgment was thereupon entered in favor of plaintiff and against defendant in the sum of \$1469.26, together with interest, costs and attorney's commissions. Before the trial the plaintiff procured a writ of attachment to issue in this action and caused the same to be levied upon the property of the defendant. The return of the officer levying said attachment shows that it was levied on the following described property of the defendant, to wit:

"All of the right, title and interest of the within named Antone Nobriga, defendant, in and to all of the said real property, to wit:

"1. All of that certain piece or parcel of land situated at Manowaiopae Homestead, District of North Hilo, County of Hawaii, known as lots No. 64 and 65 Manowaiopae Homestead Tract, and being more particularly described on Map 2555, known as Hokumahoe land, containing an area of 25.80 acres.

"2. One house lot No. 47, Kanowaiopae Homestead Tract.

"3. Two wooden frame building with iron roofing—one building containing six rooms and the other one room.

"4. One redwood water tank.

"5. All his interest in the growing crops on Lots No. 64 and 65 Manowaiopae Homestead Tract."

Before the trial the defendant moved that the writ of attachment be dissolved, the motion being in the following language:

"Comes now the defendant, Antone Nobriga, and moves the court that the writ of attachment issued out of this court and in this cause on February 4th, 1920, and levied upon the property of the defendant, as shown by the return of the officer levying said attachment, be dissolved and the same be declared to be of no force and

Opinion of the Court.

effect as against this defendant and the property of this defendant, upon the following grounds:

"I. That no copy of the complaint and no copy of summons was served on defendant.

"II. That the copy of the alleged bond in attachment shows that the sureties on the alleged attachment bond did not justify as by law required; that the alleged attachment bond has no surety thereon and that the purported signature of 'Home Insurance Company of Hawaii' to the said alleged bond does not purport to have been signed by any person having authority so to do, and that said bond is insufficient.

"III. That the real property levied upon under said writ of attachment is not subject to levy of attachment or execution for the reason said real property is held by defendant under a special homestead agreement issued by authority of the commissioner of public lands of the Territory of Hawaii.

"IV. That the two wooden frame buildings with iron roofing and the one redwood water tank levied upon under said attachment are a part of the real property held under said above referred to special agreement so issued, and are not liable to be taken on attachment or execution.

"V. That the interest in the growing crop of cane so levied upon under said attachment is a part of the real property owned under said special homestead agreement and is not liable or subject to levy under attachment or execution.

"This motion is based upon all the records, files, and the return of the officers serving said attachment and upon oral testimony and evidence to be introduced upon the hearing hereof.

"Wherefore, defendant prays that said writ of attachment be dissolved and dismissed and held for naught, and be declared to be no lien on the defendant's property."

In support of this motion the defendant offered and there was received in evidence defendant's special homestead agreement No. 1083, dated December 20, 1913, covering lots Nos. 47, 64 and 65, government survey regis-

Opinion of the Court.

tered map No. 2555, situated at Manowaiopae, after which the plaintiff admitted that the tanks, houses and buildings named in the attachment are the same as specified in the special homestead agreement. The motion to dissolve the writ of attachment was denied.

To the ruling refusing to dissolve the writ of attachment as well as to the decision of the circuit judge finding against him on his set-off the defendant excepted and the bill of exceptions here presented challenges the correctness of these rulings.

Under his exception to the decision of the circuit judge against him on his set-off the defendant argues that the decision is contrary to the law, the evidence and the weight of the evidence. The testimony of the defendant in support of his set-off is to the effect that prior to the year 1912 he had been in the employ of the plaintiff for eighteen or twenty years; that he was employed at the landing at Laupahoehoe to receive and take charge of the freight landed there for the liquor house and store of the plaintiff and for such services he was to receive a wage of \$20 per month; that from January 1 to June 30, 1912, he was employed in said work and that with the knowledge of plaintiff he employed other men to assist him and that he paid for such assistance during said six months the sum of \$266.65; that in the month of June, 1912, he went to the plaintiff and took his books of account which he exhibited to plaintiff and asked to have the said account O. K.'d, which the plaintiff refused to do; that believing the plaintiff was only fooling with him he took his books and went away; that at another time, the exact date not being mentioned, he called upon the plaintiff and had with him \$400 in cash which he proposed to pay upon his account provided the plaintiff would O. K. his claim, which the plaintiff refused to do. The defendant further

Opinion of the Court.

testified that during the months of July, August, September and October, 1912, he worked as yard boy in and about the premises of Mrs. Barnard at the request of the plaintiff and that he assumed that he would receive for such work \$20 a month, the same amount of wages he had been receiving from plaintiff, although he admits that no wages were agreed upon, and also admits that when he first mentioned this item to Mr. Moses that he was informed that he would have to look to Mrs. Barnard for his payment. The defendant also testified that in December, 1914, his son used his (defendant's) horses and wagon for three days hauling freight from the landing for the plaintiff for which a charge of \$22.75 was made, which was a reasonable charge; that in March, 1915, he furnished the plaintiff a bag of sweet potatoes for which he charged \$5 and that his son Louis worked one day for the plaintiff, for which he charged the sum of \$1.50. These last two items are admitted by the plaintiff and constitute the \$6.50 which the circuit judge allowed as a set-off. Defendant's books of account in which he claims to have made entries of the sums paid his help on particular days, a total of which shows a payment of \$266.65, were introduced in evidence. Defendant also gave the names of several of the men whom he claims to have employed and paid for assisting him in plaintiff's work at the landing and two of these men have testified that they did work at the landing under the supervision of the defendant and that defendant paid them for their work. S. Yamanaka, a witness for the defendant, testified that he began working for the plaintiff on November 20, 1911, and continued in the employ of the plaintiff for five years and four months and that for a period of about one year after he commenced work for the plaintiff the defendant Nobriga was working at the landing tending freight; that on several occasions

Opinion of the Court.

during said time when there would be a shortage of freight he would call upon the defendant to find the missing freight. The two witnesses who claim to have worked at the landing under the supervision of the defendant testified that at the time they worked at the landing the witness Yamanaka was in the employ of the plaintiff. Defendant's testimony is that none of these amounts claimed by him have been paid.

In opposition to this testimony of the defendant and his witnesses the plaintiff has testified that the defendant was not in his employ at any time during the year 1912 and was not authorized to expend any money for labor in his behalf; that during the year 1911 the defendant had an account with plaintiff which was settled up to March 31, 1912, said settlement being made July 30, 1912, by the payment of \$86 in cash. The plaintiff also testified that during the months in 1912 when the defendant claims to have worked at the landing and employed others to assist him that he himself paid such employees as worked at the landing. The item of \$22.75 for three days' hauling of freight from the landing was not called to the attention of the plaintiff while testifying and he made no specific denial of this item but he does testify that after the year 1911 the defendant was not at any time in his employ, and this item according to the defendant's statement was in the year 1914. The plaintiff testified that the items contained in this set-off were never presented to him until in 1918, the day before the filing of this suit and that until that time he never heard of them.

Upon the conclusion of the testimony the circuit judge filed a written decision in which after reviewing the testimony he said: "I find as a matter of fact that the defendant was not in the employ of the plaintiff during the year 1912. * * * I find as a matter of fact that

Opinion of the Court.

the defendant did not employ any men during the year 1912 to assist him at the landing at Laupahoehoe to handle plaintiff's merchandise. Defendant introduced two books in evidence marked Defendant's Exhibits '1' and '2' respectively. The very attitude of defendant while on the stand and from a casual inspection of the exhibits just above referred to conveys to the mind of the court that the books are no more reliable than the testimony adduced by defendant and his witnesses. I do not believe their evidence. I find as a matter of fact that in the month of July or August, 1912 a settlement in full was had between plaintiff and defendant and in that settlement defendant paid plaintiff \$86.00. I find as a matter of fact that defendant never demanded of plaintiff, between the settlement in full in July or August of 1912 and the date of the filing of this action by plaintiff, the amount of the set-off. Believing as I do the testimony of plaintiff, he is entitled to the defense of the statute of limitations and defendant's set-off should be defeated on that ground. Plaintiff is a man who impressed the court that he was telling the truth in every particular, so I believe his evidence and I do not believe the evidence of the defendant or his witnesses."

The defendant recognizes the rule of law that the decision of the circuit judge in a jury-waived case is equivalent to the verdict of a jury and will not be disturbed if supported by evidence but contends that the decision should be a judicial decision, that is, a decision reached in accordance with established rules of law. His contention in this respect is no doubt correct, but with his further contention that in this case the evidence does not support the decision we cannot agree. The plaintiff's testimony contradicts every material part of defendant's case and while defendant brought other witnesses who corroborated him in part of his testimony we are unable

Opinion of the Court.

to say that the circuit judge was not justified in believing plaintiff and disbelieving defendant and his witnesses. He heard the witnesses testify and observed their demeanor while on the stand and has said that he does not believe their testimony. There is no rule of law which compels one to believe as a judge what he does not believe as a man. It is not always the greatest number of witnesses testifying as to a fact that carries conviction. The testimony of one witness may overcome that of several if the one gives the impression that he is truthful and the others do not. Issues concerning the credibility of witnesses and the weight of the evidence are to be determined by the trial court and the findings cannot be disturbed if supported by evidence. The circuit judge having observed the demeanor of the witnesses and decided in accordance with plaintiff's testimony his decision will not be disturbed regardless of the grounds on which the decision is based. (*Lau Lam v. Whitcomb*, 21 Haw. 252; *Scott v. Kona Development Co.*, 21 Haw. 258.)

This brings us to a consideration of the exception to the refusal to dissolve the writ of attachment. The defendant has expressly waived the first two grounds which go to the alleged irregularities in the issuance of the writ for the reason that no practical benefit would accrue from a sustaining of those grounds since an execution could now issue on the judgment. But he urges the remaining grounds, all of which raise the same question, namely, whether or not the property levied upon is exempt and if so whether the writ should be dissolved for that reason.

One of plaintiff's contentions is that the question of whether or not the property is exempt cannot properly be considered on a motion to dissolve the writ of attachment.

The first question raised by the argument of the par-

Opinion of the Court.

ties which we will now notice is the question of whether this is merely a motion to dissolve the writ of attachment or may be also considered as a motion to quash the levy on the ground that the property levied upon is exempt. Certainly the first two grounds set forth in the motion and which have been abandoned were put forth for the purpose of procuring a dissolution of the writ itself but the remaining grounds upon which the defendant relies here are proper grounds for questioning the levy (*Atcherley v. Jarrett*, 19 Haw. 511,) and must be considered if the motion can be construed to be a motion to quash the levy. But we do not think the motion can be so construed. The motion is "that the writ of attachment * * * be dissolved and the same be declared to be of no force and effect as against this defendant and the property of this defendant," and the prayer is "that said writ of attachment be dissolved and dismissed and held for naught and be declared to be no lien on the defendant's property." If then the exemption of the property levied upon cannot be inquired into on a motion to dissolve the writ the circuit judge was right in denying the motion regardless of whether the property levied upon is or is not exempt. In 6 C. J. 431 it is said that "it is usually not a sufficient ground for dissolving a writ of attachment that the property levied on thereunder was not legally subject to seizure under the writ."

Section 2797 R. L. 1915 provides that the defendant may at any time after he has appeared in the action, either before or after the release of the attached property or before any attachment shall have been actually levied, apply on motion upon reasonable notice to the plaintiff to the court in which the action is brought, or to the judge thereof, that the writ of attachment be discharged on the ground that the same was improperly issued. If upon such application it satisfactorily appears that the

Opinion of the Court.

writ of attachment was improperly issued it shall be discharged. In the case of *Holman v. Cooper*, 48 Wash. 24, the defendants appeared specially and moved to dissolve the attachment upon the records and files and upon the evidence attached to the motion. The affidavits were in substance that the note upon which the suit was founded was a surety obligation of the defendant T. M. Cooper and that the property attached was the community property of the defendants and not subject to attachment for that debt. The attachment was dissolved and the plaintiff appealed. In a discussion of this question the court said: "The attachment is a purely statutory matter and before the writ can be issued the requirements of the statute must be strictly met. The dissolution of an attachment is equally statutory and the mandate of the statute in that respect must also be complied with. Our statute provides * * * that the defendant may at any time after he has appeared in the action apply upon motion to the court in which the action is brought, or to the judge thereof, that the writ of attachment be discharged on the ground that the same was improperly or irregularly issued. No such application was made in this case, the ground of the motion not being that the attachment was improperly or irregularly issued but that the property levied upon was exempt from seizure under the writ of attachment. So that it is plain that the requirements of the statute have not been met in that respect." In *Quigley v. McEvony*, 41 Neb. 73, 78, it is said that "the main propositions to be decided at such a hearing are, first, the sufficiency of the affidavit; second, the falsity of the charge in the affidavit filed to obtain the issuance of the writ of attachment. Whatever matters may be in some cases necessarily or properly heard and determined we do not think it is competent or proper practice where the writ is levied upon real estate

Opinion of the Court.

belonging to the debtor to allow the homestead character of the property to be drawn in question as one of the grounds of the motion to discharge the attachment." In *Foundry Co. v. Mfg. Co.*, 11 Utah 404, 413, the court after holding that the Utah statute does not authorize the dissolution of the attachment on the ground of the exempt nature of the property said: "Nor is the authority for it to be found in that somewhat hazy field of jurisprudence known as the 'inherent power of the court.'" (See also *Culhane Adjustment Co. v. Farrand*, 34 S. D. 87, 147 N. W. 271; *Mason, Ehrman & Co. v. Lienallen*, 4 Idaho 415.) It will be noted that our statute setting forth the ground upon which a writ of attachment may be discharged is almost identical with the Washington statute referred to in the case from which we have quoted, which fact removes any objection that may be urged against the application of the decisions of that State because based on a construction of their statute. From these decisions we gather the rule to be that it is not a sufficient ground for dissolving a writ of attachment that the property levied upon is exempt from seizure under the writ. We are not unmindful of the fact that there are some decisions holding to the contrary. (*McLaren v. Hall*, 26 Ia. 297; *Lodor v. Baker, Arnold & Co.*, 39 N. J. L. 49, and *Brenizer v. Supreme Council*, 141 N. C. 409, 53 S. E. 835.)

For the reasons set forth we think the exceptions should be overruled and it is so ordered.

J. W. Russell (*Russell & Patterson* on the brief) for plaintiff.

W. H. Smith (*H. L. Ross* and *W. S. Wise* with him on the brief) for defendant.

Syllabus.

C. Q. YEE HOP, ET AL., v. YOUNG SAK CHO,
ET AL.

No. 1241.

APPEAL FROM CIRCUIT JUDGE FIRST CIRCUIT.
HON. J. J. BANKS, JUDGE.

ARGUED APRIL 30, 1920.

DECIDED MAY 26, 1920.

COKE, C. J., KEMP AND EDINGS, JJ.

EQUITY—parol leases—statute of frauds.

Although a parol agreement to grant a lease may be void under the statute of frauds it will still be enforced in equity where there has been a substantial part performance of it though on the part of the plaintiff only if possession has been delivered and the tenant has expended money in buildings or improving the property in pursuance of the agreement.

SAME—same—same.

Where the lessees holding under oral leases have paid substantial premiums for the leases enjoyed by them and have pursuant to the provisions of the leases and with the knowledge and consent of the owners expended a large amount of money in improving the demised premises equity will interfere to prevent the owners from ousting the lessees in the manner prescribed in section 2754 R. L. 1915 and to prevent them from impleading the statute of frauds to invalidate the leases under which the lessees possess the premises.

LANDLORD AND TENANT—leases—mutuality.

The ancient rule to the effect that a lease which puts it in the power of the lessee to terminate the lease at will is void for want of mutuality has long since been discarded and has no place in the present day analogies of the law of tenancies.

SAME—right of lessees under oral lease as against subsequent purchaser—notice.

The rule is that where a party purchases or leases real estate in the possession of another not his vendor or lessor he is chargeable with knowledge of all the rights of the party in possession and the law imposes upon him the duty to make reason-

Opinion of the Court.

able inquiry as to the rights of persons in possession and if he fail to do so he cannot be deemed to be a purchaser in good faith for value and the provisions of section 3118 R. L. 1915 will not protect him.

OPINION OF THE COURT BY COKE, C. J.
(Edings, J., dissenting.)

This is a suit in equity instituted by the petitioners praying for an injunction to restrain the respondents from violating the terms of the leases under which petitioners claim to be occupying certain fish and vegetable stalls in what is known as the Oahu market situated at the corner of King and Kekaulike streets in the city of Honolulu. It is alleged in the bill of petitioners that Y. Anin, who was the owner of the premises, leased the same to one Young Tuck for the term of 50 years from October 1, 1902; that on June 22 and June 27, 1904, the said Young Tuck orally leased certain of the stalls in the market building to the predecessors in interest of certain of the petitioners at a fixed rate of \$15 per month for fish stalls and \$14 per month for vegetable stalls, the allegations of the bill in this behalf reading as follows: "That the said Young Tuck orally leased certain of the said stalls, or tables, to the petitioner Wong Pun (Pang) and to the predecessors in interest of the other petitioners at a fixed rental at the rate of \$15.00 a month for a meat or fish table, and \$14.00 a month for a vegetable or grocery stall, it being then agreed between the said Young Tuck and his tenants that they were to pay the rental monthly in advance, without demand; that the landlord was to pay the ground and general building taxes, but the tenants the license fees; that the tenants were not to assign nor sublet without the permission of the landlord; that the tenants were to keep the stalls and appurtenances clean, in good order and condition, and were not to make alterations; that the

Opinion of the Court.

tenants were not to erect any buildings or structures of any kind without the consent of the landlord; that the tenants were to keep the premises in sanitary condition and were to obey and observe all rules and regulations of the board of health and of the police and the law generally; that, on nonpayment of rent when due, or on the breach of any condition or agreement on the part of the tenant to be observed or performed, then the landlord or his agents might enter the premises, forcibly, if necessary, and terminate the tenancy and remove the tenant and his effects forcibly, if necessary, without being deemed guilty of trespass and without any liability therefor; that the tenants were not to commit nor suffer any nuisance or source of filth or accumulation of garbage or refuse of any kind; that the tenants were not to use the premises for any other purpose than that of a market; and that, if the tenants, their heirs, executors, administrators and permitted assigns, observed and performed the conditions and agreements as stipulated and paid the fixed rentals, they might exercise the option, at the end of each month, of renewing the leaseholds, they having the right to repeat these renewals indefinitely." The petition also avers that under the direction of Young Tuck the right to occupy some twenty odd stalls was sold at auction to the highest bidder for the premiums thus paid, ranging from \$27 to \$300 per stall, a total premium of \$4384.50 being paid by the tenants at that time to Young Tuck; that certain other of the stalls were subsequently leased to petitioners or their predecessors in interest without auction but upon the same terms and conditions as those which were auctioned. It is further alleged that pursuant to the terms of the oral agreements the tenants entered into possession of said stalls and that they and their permitted assigns have held the same continuously to the present date; that in

Opinion of the Court.

the year 1912 pursuant to the terms of the oral leases and with the knowledge and consent of the respondents the lessees expended over \$11,000 in improvements in and to the market building and that the lessees have at all times paid the stipulated rentals of \$15 a month for meat or fish stalls and \$14 for vegetable or grocery stalls. It is further alleged that the petitioners herein are the successors or permitted assigns of the original lessees of the various stalls as hereinabove described. It is further alleged that in October, 1904, Young Tuck assigned his leasehold to the Oahu Market Company, Limited, and that thereafter up to and including May, 1919, the lessees have attorned to the company paying it the rent at the rate hereinabove specified, which payments have been accepted as correct by the company; that on July 1, 1919, the respondent the Oahu Market Company, Limited, then being the owner in fee of the premises, leased the premises to the respondents Young Sak Cho and Charles F. Chillingworth for a term of ten years from that date; that on July 31, 1919, said respondents Young Sak Cho and Chillingworth notified petitioners that the rental for the stalls occupied by them would be \$30 per month each beginning September 1, 1919, and further notified them that if these increased rentals were not paid by September 1, 1919, proceedings would be instituted to oust them from the premises; that thereafter Young Sak Cho and Chillingworth did begin an action for summary possession against one of the petitioners in the district court of Honolulu and a judgment being rendered in favor of said respondents a writ of execution was issued thereon, and other attempts were being made to oust the petitioners of the possession of the stalls held by them under their respective leases. It is further alleged that the petitioners have performed all the obligations resting upon them by virtue of the

Opinion of the Court.

terms of their leases and now offer to further observe and perform the same; that petitioners have no adequate remedy at law and all of their claims and rights arise out of the same events and transactions and depend upon the same questions of law and similar matters of fact. The bill is very lengthy and we have merely attempted to summarize the more salient features thereof.

To the bill of complaint the respondents interposed demurrers. From the decree of the court below overruling their demurrers the respondents have perfected an appeal to this court. The demurrers present a number of grounds therefor, the following of which we will discuss in this opinion: (1) That the tenancies in said alleged amended petition being by parol are by statute (Sec. 2754 R. L. 1915) determinable by a notice to quit of at least ten days; (2) that the alleged oral leasehold agreements set out and relied upon by the petitioners are within the fourth and fifth clauses of the statute of frauds (Sec. 2659 R. L. 1915) and are void for not being in writing; (3) that such alleged oral agreements are void for want of mutuality and (4) that it nowhere appears from the allegations of said amended petition that these respondents or any or either of them had actual or any notice of said alleged oral agreements of leasehold.

The first and second grounds of demurrer above outlined are closely allied and out of regard for brevity will be grouped and disposed of as one subject. The statutes referred to and which are the basis of paragraphs 1 and 2 of the demurrer above quoted read as follows:

“Sec. 2754. * * * Whenever any lessee or tenant of any lands or tenements, or any person holding under such lessee or tenant, shall hold possession of such lands or tenements without right, after the determination of such tenancy, either by efflux of time or by reason of any

Opinion of the Court.

forfeiture, under the conditions or covenants in any such lease; or, if a tenant by parol, by a notice to quit of at least ten days, the person entitled to such premises may be restored to the possession thereof in manner herein-after provided."

"Sec. 2659. * * * No action shall be brought and maintained in any of the following cases: * * *

"Fourth. Upon any contract for the sale of lands, tenements or hereditaments, or of any interest in or concerning them;

"Fifth. Upon any agreement that is not to be performed within one year from the making thereof;

"Unless the promise, contract or agreement upon which such action shall be brought, or some memorandum or note thereof, shall be in writing, and be signed by the party to be charged therewith or by some other person thereunto by him lawfully authorized."

It is contended by respondents that the parol leases set forth in the petition are at most mere tenancies from month to month determinable by the lessor upon notice of at least ten days as provided for in section 2754 R. L. Respondents further argue that the oral leases are void under the fourth and fifth clauses of the statute of frauds above quoted; that in the face of those provisions of law no interest in land whatever, not even a leasehold, can be created by parol in the Territory of Hawaii which will be binding upon the parties. We think it cannot be doubted that the oral leases mentioned in the petition must be taken as conveying an interest in land and therefore come within the statute of frauds unless for some special reason which the law recognizes as sufficient they are relieved from the operation of that statute. We furthermore conclude that because the leases created tenancies solely by parol they are governed by the provisions of section 2754 unless for a like reason they have been removed beyond the pale of that statute. But it is a well recognized principle of equity jurisprudence that

Opinion of the Court.

courts of chancery will very frequently intervene to enforce a verbal contract notwithstanding the statute of frauds, and in a recent opinion this court quoted with approval the rule announced in *Rose v. Parker*, 4 Haw. 593, to the effect that courts of equity will interfere to prevent the bar of the statute of limitations where equity and justice call for such interference. See *Houghtailing v. De La Nux*, ante p. 438. In *Rose v. Parker*, supra, it is further held that "Equity will intervene to enforce a verbal contract for the sale of land, notwithstanding the statute of frauds, where one party has done certain acts in part execution and upon the faith of the contract with the knowledge and consent of the other, if the contract is so far executed that for the latter to repudiate it would amount to a fraud upon the other." The court in that case further announced the rule to be that the mere payment for land accompanied by possession is part performance. Again the supreme court of Hawaii in *Maule v. Waihee Sug. Co.*, 4 Haw. 637, held that "a parol agreement for the exchange of lands will be compelled to be executed if it has been carried into effect with the knowledge and consent of the other contracting party so that it would be against equity to repudiate it." See also *Vierra v. Ropert*, 10 Haw. 301. In *Neale v. Neales*, 76 U. S. 1, the court says that "Equity protects a parol gift of land equally with a parol agreement to sell it, if accompanied by possession, and the donee, induced by the promise to give it, has made valuable improvements on the property. And this is particularly true where the donor stipulates that the expenditure shall be made, and by doing this makes it the consideration or condition of the gift." Again the supreme court of the United States in *Brown v. Sutton*, 129 U. S. 238, in a suit in equity to compel the specific performance of a parol contract to convey real estate, declares the rule

Opinion of the Court.

to be that where there is a sufficient showing of a part performance of the parol contract to take it out of the operation of the statute of frauds equity will enforce specific performance. In reviewing this case the court makes mention of the fact that while the rule respecting the necessity for a written agreement in regard to the title to real property is almost universally understood among all classes of people, however unlearned in the law, it is not very well known that there is an exception to it in the case of a promise, not in writing, but so far performed as to take it out of the statute of frauds. And again, in *Townsend v. Vanderwerker*, 160 U. S. 171, the court in dealing with the effect of the statute of frauds in the absence of a contract in writing lays down the rule to be that a mere payment of the consideration in money is insufficient to remove the bar of the statute but there is no doubt that such payment accompanied by an entry into possession under the contract is such a part performance as will support the bill.

Judge Story has adopted this principle in his work on Equity Jurisprudence, Vol. 1, Sec. 759, in the following language: "Courts of equity will enforce a specific performance of a contract within the statute (statute of frauds) where the parol agreement has been partly carried into execution. The distinct ground upon which courts of equity interfere in cases of this sort is, that otherwise one party would be able to practice a fraud upon the other and it could never be the intention of the statute to enable any party to commit such a fraud with impunity. Indeed, fraud in all cases constitutes an answer to the most solemn acts and conveyances and the objects of the statute are promoted instead of being obstructed by such a jurisdiction for discovery and relief. And where one party has executed his part of the agreement, in the confidence that the other would do the

Opinion of the Court.

same, it is obvious that if the latter should refuse it would be a fraud upon the other to suffer this refusal to work to his prejudice." See also Browne on the Statute of Frauds, 4 ed., Sec. 448, where the same rule is announced and elaborated upon. Sections 2754 and 2659 R. L. 1915 stand upon the same plane. The one is no more sacred than the other and the provisions of neither is immune from the operation of these salutary principles of equity jurisprudence hereinabove set forth. Equity will intervene to prevent the use of either of said statutes where the one invoking their aid is attempting to perpetrate a fraud upon another.

In the case at bar the petitioners or their predecessors in interest paid substantial sums by way of premiums for the leases which they now enjoy and thereafter pursuant to the provisions of their leases and with the knowledge and consent of the respondents expended a large amount of money in improving the demised premises and it would amount to a fraud upon them to now permit the owners to oust them in the manner specified in section 2754 or to permit them to implead the statute of frauds to invalidate the leases under which the petitioners possess the premises. And for these reasons we do not deem it material whether by the terms of the oral agreements the lessees were granted the right of options for leases which they might avail themselves of at the end of each month and from month to month up to the date of the expiration of the lease held by Young Tuck or whether as contended by the respondents the oral agreements granted a present demise for the whole period of Young Tuck's lease, for whichever view may be adopted equity will interfere to prevent defeasance by the lessor. As said by Lord Cottenham: "Courts of equity exercise their jurisdiction in decreeing specific performance of verbal agreements where there has been

Opinion of the Court.

part performance for the purpose of preventing the great injustice which would arise from permitting a party to escape from the engagements he has entered into, upon the ground of the statute of frauds, after the other party to the contract has, upon the faith of such engagements, expended his money or otherwise acted in execution of the agreement. Under such circumstances the court will struggle to prevent such injustice from being effected" (*Mundy v. Jolliffe*, 5 My. and Cr. 177). And under the facts presented in the petition equity ought to interfere to prevent the respondents from repudiating their agreements with the aid of the statute of frauds, and this should be done even though the terms of the agreements conflict with the provisions of that statute. "Although a parol agreement to grant a lease may be void under the statute (statute of frauds) it will still be enforced in equity where there has been a substantial part performance of it though on the part of the plaintiff only. * * * If possession has been delivered under such an agreement it will be considered as a part performance, especially if the tenant has expended money in buildings or improving the property in pursuance of it" (1 Taylor, Landlord & Tenant, 8 ed. Sec. 32). The opinion of this court in *Yip Lan v. Ahuli*, 23 Haw. 307, at p. 311, sustains the validity of an option for a lease and holds that if the option is exercised within a reasonable time both parties are bound by it and the lessee becomes entitled to have the lease renewed on the terms agreed upon and that equity will compel specific performance at the suit of the lessee. An English case which very clearly illustrates the principles involved is *Sutherland v. Briggs*, 1 Hare 26, 66 Eng. Repr. 936.

The next ground of demurrer urged by respondents is that the oral leases referred to in the petition are void for want of mutuality, that is to say, that because under

Opinion of the Court.

the terms of the leases the right to terminate them at will is reserved solely to the lessees the leases are either wholly void or at best mere tenancies at will or from month to month. The ancient rule to the effect that a lease which puts it in the power of the lessee to terminate the lease at will is void for want of mutuality has long since been discarded and has no place in present day analogies of the law of tenancies. The identical question was presented to this court in *Ho Tong v. Hope*, 23 Haw. 603, where this court in passing upon the question said: "Counsel for defendant urges that the contract of lease is void for want of mutuality for the reason that the lease reserves a right of cancellation to the lessors without a corresponding right reserved to the lessee. We can see no merit in this contention." See also *Lewis v. Effinger*, 30 Pa. 281; *Doe v. Dixon*, 9 East. 15; *Cook v. Bisbee*, 18 Pick. 527; *Folts v. Huntley*, 7 Wend. 210. And speaking generally of the rule of mutuality as applied to proceedings in equity this court in *Lum Wai v. Hong Hoon*, 24 Haw. 986, at p. 705, adopted what we deem to be the modern and reasonable rule in the following language: "The mutuality required is that which is necessary for creating a contract enforceable on both sides in some manner, but not necessarily enforceable on both sides by specific performance."

The final point is made by the respondents that the petition is deficient and demurrable because it is not alleged therein that the respondents Young Sak Cho and Charles F. Chillingworth had actual notice of the oral leasehold agreements under which petitioners are alleged to be occupying the premises. In support of this position the respondents rely upon the provisions of section 3118 R. L. 1915, which reads as follows: "All deeds, leases for a term of more than one year, or other conveyances of real estate within this Territory, shall be recorded in

Opinion of the Court.

the office of the registrar of conveyances, and every such conveyance not so recorded shall be void as against any subsequent purchaser, in good faith and for a valuable consideration, not having actual notice of such conveyance, of the same real estate, or any portion thereof, whose conveyance shall be first duly recorded." It is argued that under this statute and the allegations of the petition the respondents Young Sak Cho and Charles F. Chillingworth occupy the status of innocent purchasers for value without notice. The general rule is that where a party purchases or leases real estate in the possession of another not his vendor or lessor he is chargeable with knowledge of all the rights of the party in possession. (29 Cyc. 1113; *Tuttle v. Jackson*, 6 Wend. 213.) In *Sutherland v. Briggs*, *supra*, the court says: "The plaintiff being in the occupation of the meadow in question at the time of the defendant's purchase he must be affected with notice of the interest, whatever it may be, which the plaintiff had in it." So in the present case, at the time the respondents Young Sak Cho and Charles F. Chillingworth acquired their lease of the premises from the Oahu Market Company, Limited, the petitioners herein were in possession of the several stalls under their oral agreements of leasehold and there was nothing in this possession which was not entirely consistent with what appeared of record. All doubt as to what the law on this subject is in this Territory has been set at rest in the opinion of this court in *Achi v. Kauua*, 5 Haw. 298, where the court says: "In equity and at common law without reference to special statutes, and, it seems to us, upon reason, good faith requires a purchaser of land to take his title subject to the claims of parties in possession when he buys. Under our statute, if the party in open possession is unable to show actual notice of his unregistered deed to a subsequent purchaser, his posses-

·Opinion of the Court.

sion is constructive notice to such purchaser of all his rights, and he cannot be disturbed therein." The general rule as written in the syllabus to that opinion is that "The actual possession of land by a party under an unrecorded deed is constructive notice to a subsequent purchaser of the land whose deed is recorded."

Applying these rules to the facts as alleged in the petition herein the duty is not upon the petitioners to allege or to prove that the respondents Young Sak Cho and Charles F. Chillingworth had actual notice of the rights of the petitioners in the premises in question because the petitioners being in open possession the law imposes upon respondents the duty to make reasonable inquiry as to the rights of the persons in possession and if they failed to do so they cannot be deemed to be purchasers in good faith for value and the provisions of section 3118 would not protect them. If as a matter of fact they are purchasers in good faith for value this would be a matter for them to set up by way of defense.

The fact must not be overlooked that the cause is now before us on the merits of respondents' demurrer and that all facts properly pleaded are to be taken as admitted. Considering the cause from this standpoint we are convinced that the petition divulges sufficient facts to call for equitable relief. To adopt the view contended for by respondents would be to permit them not only to repudiate a solemn agreement but at the same time to profit by the repudiation. If the leases may now be terminated by the respondents they might with equal right have been terminated at the expiration of forty-five days after they were first agreed upon notwithstanding the fact that the lessees were required to pay a premium of \$4384.50 for the right to enjoy them. And they might have been terminated in a like period after the lessees pursuant to the terms of the leases had expended upwards of \$11,000

Opinion of Edings, J.

in improving the property. The petitioners have kept and performed all of the covenants on their part to be observed and have in every respect acted with the utmost of good faith, the jural equities of the case as divulged by the record are all with them and to now permit them to be summarily dispossessed of the premises would amount to a fraud upon their rights. It was to prevent the rigor and injustice of just such an act as is contemplated by the respondents that courts of equity were created.

We have examined all the grounds of demurrer urged by respondents and find them without merit.

The decree appealed from is affirmed.

W. B. Lymer (*Perry & Matthewman* and *W. J. Robinson* with him on the brief) for petitioners.

E. M. Watson (*Watson & Clemons* on the brief) for respondents.

DISSENTING OPINION OF EDINGS, J.

I am unable to concur in the foregoing opinion and therefore respectfully dissent.

Syllabus.

FRANK R. CASTANHA *v.* THOMAS J. FITZPATRICK
AND FRANK MUSCOTO.

No. 1249.

RESERVED QUESTION FROM CIRCUIT COURT FIRST CIRCUIT.
HON. J. T. DEBOLT, JUDGE.

SUBMITTED MAY 25, 1920.

DECIDED JUNE 3, 1920.

COKE, C. J., KEMP, J., AND CIRCUIT JUDGE FRANKLIN
IN PLACE OF EDINGS, J., ABSENT.NEGLIGENCE—*concurrent negligence—joint liability.*

If two or more wrongdoers negligently contribute to the personal injury of another by their several acts which operate concurrently so that in effect the damages suffered are rendered inseparable they are jointly and severally liable and may be joined in one action.

OPINION OF THE COURT BY KEMP, J.

The automobile of the defendant Fitzpatrick collided with the automobile of the defendant Muscoto at the intersection of King and Aala streets in Honolulu. The plaintiff, a passenger for hire in the automobile of the latter, was injured in the collision and sues the owners of the two automobiles jointly for his damages occasioned by said injury. The complaint charged negligence on the part of both drivers and sets out in detail the acts and omissions of each which it is claimed constituted negligence on his part. Briefly stated the negligence charged against the defendant Muscoto is that he disregarded the duty he owed plaintiff as a passenger for hire to carry him safely, and negligently, carelessly and recklessly drove said automobile along King street at said intersection with Aala street and usurped the right of way along King street at said intersection although another auto-

Opinion of the Court.

mobile owned by the defendant Fitzpatrick was approaching said intersection from the right down Aala street in a westerly direction towards King street and then and there had the right of way on such intersection over the automobile of the defendant Muscoto and the defendant Muscoto knew, or by the exercise of due care could have known, that to usurp the right of way at said intersection would, should the automobile of the said Fitzpatrick continue on its way westerly down Aala street and exercise its right of way at said intersection, inevitably result in a collision between the two said automobiles; that the defendant Muscoto owed plaintiff the duty of stopping his automobile or of taking such other means as might be necessary to avoid a collision but said defendant failed to exercise the due care which he owed the plaintiff and negligently, carelessly and recklessly failed to stop or to take such other means as might be necessary to avoid a collision with the other defendant's automobile. Briefly stated the negligence charged to the defendant Fitzpatrick is that as he drove along said Aala street and approached said intersection of Aala and King streets he saw, or by the exercise of due care and caution, could have seen, that the said Muscoto was driving his automobile along said King street and across said intersection with Aala street and was usurping said right of way as aforesaid and knew, or by the exercise of due care and caution could have known, that he by stopping his said automobile or taking other suitable and proper action could have averted a collision with the defendant Muscoto's automobile but that he then and there disregarded the duty which he owed the owner of said other automobile and the occupants thereof to exercise due care and caution and negligently, carelessly and recklessly failed to stop his automobile or to take such other means as might be necessary to avoid a collision with Muscoto's

Opinion of the Court.

automobile and continued driving the same westerly down Aala street and against Muscoto's automobile; and said Muscoto's automobile and said Fitzpatrick's automobile then and there and by reason of and under the circumstances as alleged collided on King street at said intersection, the front end of Fitzpatrick's automobile striking Muscoto's automobile on the latter's right hand side immediately to the rear of the front right fender, and said Fitzpatrick's automobile while so in collision with Muscoto's automobile, although plaintiff was without fault and not guilty of any negligence on his part, struck the plaintiff in and about his legs lacerating one and injuring the same and fracturing the tibia and fibula of plaintiff's left leg. It is alleged that the action of the defendant Muscoto and the defendant Fitzpatrick and of each of them was negligent, careless, reckless and in violation of the duty which each and both of them owed to plaintiff and the aforesaid injury to plaintiff was caused by and resulted from the aforesaid recklessness, negligence, wrongdoing and want of reasonable care on the part of said defendants and each and both of them and without any fault of the plaintiff. It is not alleged that there was any concert of action or breach of any joint duty on the part of the defendants. The allegations of the complaint negative any such idea.

The defendants each interposed a demurrer to the complaint stating three grounds, namely, (1) insufficiency of facts to constitute a cause of action, (2) uncertainty, indefiniteness and inconsistency in the allegations and (3) misjoinder of parties defendant.

After argument on the demurrers the circuit judge being in doubt as to the merits of said demurrers reserved to this court the question, "Should the demurrer be sustained on the grounds submitted?" The parties have devoted very little attention to the first two grounds of

Opinion of the Court.

demurrer and we are unable to see any merit in either of them. The third ground, however, has been elaborately briefed by both parties and will now be considered.

The rule contended for by defendants is that where there is no joint duty or concert of action between two or more negligent persons they cannot be joined as defendants. (29 Cyc. 565.) In the same paragraph in Cyc. where the above rule is announced it is said that where the injury is the result of the concurring negligence of two or more parties they may be sued jointly or severally and that all may be sued jointly notwithstanding different degrees of care may be owed by the different defendants. It is within this principle that the plaintiff claims this case falls.

Defendants do not claim that there is no precedent for plaintiff's contention but say that the doctrine had its origin in a piece of judicial legislation in an ill considered case in New York (*Colgrove v. Ry. Co.*, 20 N. Y. 492) which has since been discredited and practically overruled in *Mooney v. Ry. Co.*, 5 Rob. (N. Y.) 548, and *Brown v. Ry. Co.*, 32 N. Y. 597. These cases do practically overrule the *Colgrove* case but they were decided in 1865 and 1868 and we find the courts of New York as late as 1902 again holding that where a passenger on a street-car was killed in a collision between the street-car and a brewery wagon caused by the concurrent negligence of both a joint action can be maintained against both, notwithstanding the different degree of care owed deceased by the two defendants. (*Sternfels v. Metropolitan Street Ry. Co.*, 77 N. Y. S. 309, affirmed without opinion 174 N. Y. 512.) This is the doctrine of the *Colgrove* case, so regardless of the discredit cast upon that doctrine by the opinions in the *Mooney* and *Brown* cases it is apparently still regarded as the law of New York.

In California the rule contended for by plaintiff is

Opinion of the Court.

recognized by the adjudicated cases. In *Spear v. United Railroads*, 16 Cal. App. 637, which was a suit for damages for personal injuries against the railroad company and Wells, Fargo & Company, a car of the defendant railroad company collided with a wagon of the defendant express company frightening the horses drawing the express wagon which crashed into a wagon being driven along the street by the plaintiff thereby injuring him. The railroad company and the express company were sued jointly. Separate but concurrent acts of negligence were charged against the two defendants, which were found by the jury on special issues submitted. In discussing the law applicable to such a case the court on pages 660-661 said: "These acts of negligence may be said to have been concurrent and simultaneous in point of time although neither of those acts standing alone would have occasioned the result. If the wagon of the express company had not been driven upon the railroad tracks it would not have been struck and the plaintiff would not have been injured. If the motorman on the car had not been negligent the collision would not have ensued and the plaintiff would not have been injured. It was the combination of the negligent acts of the two defendants that occasioned the result, and therefore inquiry is immaterial into the precise degree or extent of the negligence of each of the parties defendant; or, the relation in point of time of such acts of negligence; or whether they were concurrent or successive, independent or joint, or whether one proximately contributed to the result more than the other." The question of joinder of parties defendant does not appear to have been raised in the foregoing case, but in *Tompkins v. Clay Street Ry. Co.*, 66 Cal. 163, the question was involved and decided in accord with the plaintiff's contention. A car of the Clay street company collided with a car of the Sutter Street R. R. Co.

Opinion of the Court.

Plaintiff, a passenger on the latter, was injured. The complaint charged neglect on the part of both companies. Plaintiff sued the two companies jointly and recovered damages of the Clay street company, which appealed. In the course of its opinion the court said: "In Pennsylvania it seems to have been held that when a passenger on a carrier vehicle is injured by a collision resulting from the mutual negligence of those in charge of it and another party, the carrier alone must answer for the injury. (*Lockhart v. Lichtenthaler*, 10 Wright, 151; *Phila. and R. Railroad Company v. Boyer*, 97 Pa. St. 100.) But the weight of authority is otherwise, and is to the effect that, if the negligence of the managers of both vehicles contributes to the injury, the party injured may recover from the proprietors of either or both. (Wharton, Law of Negligence, 395, and cases cited.) Where both are sued, the plaintiff may ordinarily dismiss as to either; and, if it turn out at the trial that one was not guilty of negligence, he may, on sufficient evidence, take a verdict against the other." (See also *Doeg v. Cook*, 126 Cal. 213, 218, and *Forsythe v. Los Angeles Ry. Co.*, 149 Cal. 569.) From the adjudicated cases it is clear that the rule contended for by plaintiff is recognized as the correct one by the California courts.

Defendant has cited *Sellick v. Hall*, 47 Conn. 260, 274, for the proposition that it is not enough to make torts joint that the acts constituting them stand even in immediate juxtaposition, both in time and place. There must be a oneness of act. But in the later Connecticut case of *Tetrault v. Conn. Co.*, 81 Conn. 556, where a passenger on a street-car was injured by a collision between the car on which he was a passenger and the truck of the Smedley Company and sued both owners jointly a demurrer was interposed by the Smedley Company which challenged the sufficiency of the complaint because it

Opinion of the Court.

alleged that the car of the railway company was run at a dangerous rate of speed and negligently managed by the motorman; but it was held that this was an essential allegation in an action against two defendants in which it was alleged that the negligence of the servants of these parties jointly caused the plaintiff's injuries. This is virtually a recognition of the rule contended for by the plaintiff since if separate concurrent acts of negligence would not authorize a joinder of the two negligent parties the demurrer would have been sustained.

The defendant has cited *Valparaiso v. Moffitt*, 12 Ind. App. 250, 54 Am. St. Rep. 522, from the supreme court of Indiana. The facts of that case make it of very little value as authority in this case, but as indicating what the Indiana court would hold on the question here involved we quote the following from the opinion: "If there be no concert of action between the tort feasons, and their acts be separated as to place and time, but united in their consequences, the fact that it may be difficult to apportion the damages to each act or wrongdoer may be the plaintiff's misfortune, but it furnishes no good reason to make one wrongdoer liable for all the damages. But there is a class of cases in which the defendants are jointly and severally liable, although they are several and not joint tort feasons. As where there is no concert of action or unity of purpose, but the acts are concurrent as to place and time and unite in setting in operation a single destructive and dangerous force which produced the injury: *South Bend Mfg. Co. v. Liphart*, 12 Ind. App. 185; *Slater v. Mersereau*, 64 N. Y. 138."

In Massachusetts it is well settled that if two or more wrongdoers negligently contribute to the personal injury of another by their several acts which operate concurrently so that in effect the damages suffered are rendered inseparable they are jointly and severally liable

Opinion of the Court.

and may be joined as defendants in one action. In the case of *Feneff v. Boston & Me. Ry. et al.*, 196 Mass. 575, it was urged by the defendant *N. Y. Cent. & H. R. R. Co.* that two or more wrongdoers cannot be held jointly unless either in fact or by intendment of law they cooperate in the perpetration of the wrong. In discussing this contention of the defendant the court said: "It has been said by an eminent legal author that 'in respect to negligent injuries there is considerable difference of opinion as to what constitutes a joint liability. No comprehensive general rule can be formulated which will harmonize all the authorities.' 1 Cooley on Torts, 3d ed. 246. See Pollock on Torts (7th ed.) 194. But whatever diversity of opinion there may be elsewhere the law here must be considered as settled that if two or more wrongdoers negligently contribute to the personal injury of another by their several acts which operate concurrently so that in effect the damages suffered are rendered inseparable they are jointly and severally liable." In that case the defendant relied upon *Fletcher v. Boston & Me. Ry Co.*, 187 Mass. 463, which is also relied upon by the defendant in this case, but from the opinion in the *Feneff* case it is clear that if the opinion in the *Fletcher* case could not have been upheld upon the ground of contributory negligence of the plaintiff the same would have been overruled. (For a valuable collection of authorities supporting the holding in the *Feneff* case see p. 581 of the opinion; *Lindenbaum v. N. Y., N. H. & H. R. R.*, 197 Mass. 314; *Bryant v. Boston Elevated R. R.*, 212 Mass. 62.)

In *O'Malley v. Phila. R. T. Co.*, 248 Pa. St. 292, there was a collision between a wagon and a street-car as the result of which the wagon skidded over the sidewalk where the plaintiff was standing and injured him. The owners of both vehicles were sued jointly. We quote the

Opinion of the Court.

following from the opinion in that case: "The position taken by the transit company appears in the following point, which the trial judge refused to affirm: 'Inasmuch as the plaintiff has declared on a joint tort, and as the evidence discloses that the injury which he received was the result of two separate acts of two separate defendants, not acting in concert and without common intent, there has been an improper joinder of parties, and this action cannot be maintained in its present form.' The negligence of which the jury found the Philadelphia Rapid Transit Company guilty was the dangerous rate of speed at which its car was moving up Twentieth street; but this negligence in itself resulted in no injury to the plaintiff. The negligence of which H. A. McCleman & Brother were convicted was the failure of the driver of their wagon to observe proper care in driving across Twentieth street as the car was approaching it from the south; but this negligence of the driver, in itself, caused no injury to the plaintiff. What injured him was the collision, which was the direct result of the combined negligence of the two defendants, and, for the immediate consequences of what they jointly brought about they are, and ought to be, jointly accountable, even though the plaintiff might have sued them separately, joint wrongdoers being liable both jointly and severally."

We think that the reasons assigned for the holding in the Massachusetts and Pennsylvania cases above cited are sound and sufficiently answer defendant's contention that no sound reason can be given in support of a joinder of defendants in a case of this kind. If the concurrent negligence of both defendants contributed to the plaintiff's injury the fact that the damages suffered are inseparable is sufficient reason for holding them to be jointly and severally liable and therefore they may be joined in one action.

Opinion of the Court.

In the present case it is alleged in effect that the injury to the plaintiff arose from the concurrent negligence of the defendants and while it is not alleged that there was any concert of action between them it is alleged that their combined negligence in the simultaneous performance of unconnected duties produced a single injury to the plaintiff. If these allegations are true, as must be assumed, it becomes impossible to ascertain whether one defendant rather than the other was the efficient cause of the injury to which each contributed. The plaintiff therefore is entitled to prosecute his suit to final judgment against both defendants although he can have but one satisfaction of damages.

It may be well to add that if at the trial it should turn out that one of the defendants was not guilty of negligence and the other was the judgment should be for the defendant not guilty of negligence and against the other.

The reserved question is answered in the negative.

Peters & Smith for plaintiff.

Robertson & Olson for defendant Fitzpatrick.

Syllabus.

JOHN F. COLBURN III AND RICHARD H. TRENT,
EXECUTORS UNDER THE LAST WILL AND
TESTAMENT OF JOHN F. COLBURN, DE-
CEASED, *v.* ALFRED W. CARTER AND JOHN
C. LANE.

No. 1258.

EXCEPTIONS FROM CIRCUIT COURT FIRST CIRCUIT.
HON. J. T. DEBOLT, JUDGE.

SUBMITTED JUNE 3, 1920.

DECIDED JUNE 8, 1920.

COKE, C. J., KEMP AND EDINGS, JJ.

PRINCIPAL AND SURETY—*probate bond—judgment against principal con-
clusive on sureties.*

An order made by a circuit judge in probate against an exec-
utrix holding her to be indebted to the estate in a certain sum,
surcharging her therewith and directing her to pay the sum into
court, followed by the recovery in a court of law of a judgment
upon the bond for breach of condition conclusively binds the
sureties on the bond.

SAME—*subrogation.*

A surety who has paid the judgment is not subrogated to the
rights of his principal to the extent that he may maintain an
independent action in assumpsit against third parties for whom
he claims the money involved was actually expended.

OPINION OF THE COURT BY COKE, C. J.

John F. Colburn during his lifetime instituted a suit
in the circuit court of the first judicial circuit against
Alfred W. Carter and John C. Lane for the sum of
\$730.28. The action was one of assumpsit and grew out
of a judgment which was recovered against Jessie K.
Kaae, John F. Colburn and Antonio Long. Mrs. Kaae
was the executrix of the last will and testament of Mar-
garet V. Carter, deceased, and Colburn and Long were

Opinion of the Court.

sureties on her bond as such executrix. In a proceeding before the probate court she was by order of the court surcharged with the sum of \$730.28 and directed to deposit the same with the clerk of the court within ten days. This she failed to do and the judge of the court, the obligee named in the bond, brought suit against her and her sureties for breach of condition. Judgment was entered against them and Colburn was compelled to pay the judgment. He then instituted this suit alleging that the surcharge against the estate of Margaret V. Carter, deceased, represented an indebtedness incurred under the orders of the agent of the defendants herein, Carter and Lane, and that said money was in reality due from, and should have been wholly paid by, said defendants. At the conclusion of the evidence submitted in behalf of Colburn the trial judge on the motion of counsel for defendants entered a judgment of nonsuit against the plaintiff. Plaintiff has perfected his appeal by way of exceptions to this court. After perfecting his appeal Colburn died and John F. Colburn III and Richard H. Trent, executors under the will of John F. Colburn, deceased, have been substituted in his place and stead as plaintiffs-appellants.

The circuit judge in passing upon the motion for nonsuit in a careful and comprehensive decision held that the present suit constitutes an attempted collateral attack on the decree and order entered in the probate court as aforesaid as well as the judgment against Mrs. Kaae, John F. Colburn and Antonio Long recovered in the action at law following the refusal of Mrs. Kaae to comply with the order of the probate court. In this connection the circuit judge in his opinion rendered herein makes use of the following language: "When this plaintiff was sued on the bond in the law case No. 7703 he was not permitted by the trial court to introduce any

Opinion of the Court.

evidence on his claim that he should not be held liable on said bond by reason of the fact that the items surcharged were incurred by Mrs. Kaae as agent for the trustees rather than as executrix. This ruling of the trial court was upheld on appeal (22 Haw. 403) the court there stating that even though the order surcharging Mrs. Kaae as executrix was erroneous and assuming that said items of disbursements were made by her as agent for the trustees nevertheless said order was entered by a court of competent jurisdiction and no appeal having been taken and no allegation of fraud, collusion or the like having been made said decree was binding and conclusive and could not be collaterally attacked or questioned in any subsequent proceeding. I find that said probate decree cannot be collaterally questioned in this proceeding and that the judgment in law case No. 7703 is likewise binding against this plaintiff and in favor of the defendants herein."

There can be no doubt that the judge of the circuit court correctly expressed the law as it applies to the facts in this case for the doctrine is firmly established that proceedings such as were had in the probate and law courts against Mrs. Kaae and her sureties, in the absence of an appeal, are conclusively binding upon them and cannot be collaterally attacked. See *Robinson v. Kaae*, 22 Haw. 403; *Washington Ice Co. v. Webster*, 125 U. S. 426.

Counsel for Colburn recognize this principle of law but endeavor to avoid it by asserting that the money involved was not money belonging to the estate but belonging to the trustees and was paid out by Mrs. Kaae for the use and benefit of the trust estate at the special request of the defendants, who are the trustees of the estate. These facts might well have been employed by Mrs. Kaae as a defense in the proceedings before the

Syllabus.

probate judge or in the trial of the action upon her bond but they certainly cannot now be made use of as the basis of an independent action by Colburn against the trustees. Colburn's obligations existed solely by reason of the official bond of Mrs. Kaae and were confined entirely to her acts as executrix. If the money involved did not come into the hands of Mrs. Kaae as executrix and was not disbursed by her as such the sureties on her bond as such executrix were in nowise concerned with the transaction and under no known rule of law could Colburn now be subrogated to any rights of Mrs. Kaae to the extent that he may enjoy a right of action against these defendants.

The exceptions are overruled.

Andrews, Pittman & O'Brien for plaintiffs.

W. B. Lymer for defendants.

TERRITORY *v.* ITERIO BARQUES AND RAMON
BARQUES.

No. 1262.

EXCEPTIONS FROM CIRCUIT COURT THIRD CIRCUIT.

HON. J. W. THOMPSON, JUDGE.

ARGUED MAY 15, 1920.

DECIDED JUNE 8, 1920.

COKE, C. J., KEMP, J., AND CIRCUIT JUDGE BANKS
IN PLACE OF EDINGS, J., ABSENT.

CRIMINAL LAW—*verdict—sufficiency of evidence to sustain.*

Where in a criminal prosecution the jury upon evidence which the law recognizes as sufficient finds the defendant guilty it is beyond the province of this court to disturb the verdict.

Opinion of the Court.

SAME—*same*—*same*.

The question for our determination is not whether we would or would not have convicted the defendant upon the evidence as disclosed by the record before us but whether there was evidence sufficient to support the verdict as returned.

OPINION OF THE COURT BY COKE, C. J.

The defendants Iterio Barques and Ramon Barques, who are brothers, were jointly indicted for the crime of murder in the first degree by the grand jury duly impaneled in and for the third judicial circuit. The specific crime laid against the defendants in the indictment was the murder of Simeon Kanui, an Hawaiian youth, at South Kona, Hawaii, on or about the 3d day of March, 1915. The trial of the cause before the jury resulted in a verdict finding the defendants guilty of murder in the second degree. From sundry rulings of the court respecting the introduction of evidence and from the verdict and judgment of conviction as well as the order overruling the defendants' motion for a new trial the defendants come to this court on a bill of exceptions.

It may be said at the outset that the rulings of the trial court during the progress of the trial having to do with the introduction of evidence are free from error and call for no further comment.

The motion for a new trial attacks the verdict as being contrary to the law and the evidence and the weight of the evidence and supplements this general exception by setting forth "that the evidence in favor of the defendants so greatly preponderates that it shows mistake in the minds of the jury in rendering a verdict against the defendants and that the jury in rendering their verdict were influenced by suppositions not derived from the evidence and contrary to the facts." It appears to be the theory of counsel for the defendants that the case as presented to the jury comes within the rule prescribed in

Opinion of the Court.

King v. Asegut, 3 Haw. 526, where it was held that in case the evidence in favor of the defendant so greatly preponderates as to show mistake or prejudice in the minds of the jury in rendering a verdict of guilty it becomes the duty of the court to set aside the verdict. We will therefore briefly review the evidence in order that it may be determined whether the case at bar falls within the rule announced.

It is undisputed that the defendant Iterio Barques, a Porto Rican, during the month of March, 1915, was, and for a long time prior thereto, had been, employed by Chas. Hooper on a small ranch some five miles up the mountain from the main government road leading through the district of South Kona, Hawaii; that on or about the 1st day of March, 1915, Simeon Kanui, who was also an employee of Mr. Hooper's, went up the mountain to the cabin occupied by the defendant Iterio, taking with him sundry supplies for the ranch household. Iterio at the time occupied the ranch cabin alone. Several days after the departure of Simeon for the ranch Iterio arrived at the home of Chas. Hooper, who lived down the mountain and near the main government road. Iterio remained at the home of Mr. Hooper from Friday until the following Monday when he, together with Hooper, a Japanese and a young man by the name of Asiu, returned to the ranch house and upon arriving there Simeon was not to be found nor has he since been seen nor has his dead body or any trace thereof ever been discovered. The sheriff of the County of Hawaii together with other members of the police force immediately instituted a search for Simeon and prosecuted their attempt to solve the mystery of his disappearance until finally the grand jury in October, 1918, acting upon the evidence presented to it by the authorities, returned an indictment against

Opinion of the Court.

the defendants 'charging them with the murder of the missing youth.

The strongest evidence for the prosecution, and the only evidence which actually established the *corpus delicti*, came from the witness Joe Barques, a son of the defendant Ramon Barques. This witness at the time of the alleged crime was about ten years of age. He testified before the jury that he and his father, Ramon Barques, proceeded on foot from their home in the district of Kau, Hawaii, to the Hooper ranch some forty miles distant for the purpose of visiting his uncle Iterio Barques; that upon arriving there Iterio and Simeon Kanui were occupying the ranch cabin; that the day following their arrival, and very early in the morning, they all four proceeded up the mountain a distance of four or five miles for the purpose of hunting wild goats; that they came to a rugged and rocky place high up on the mountain side and after two goats had been shot by Iterio and a live one caught and tied by Simeon, and while Simeon was standing some distance apart from the other three, Iterio said (speaking in the Porto Rican language), in Joe's hearing, that he intended to kill Simeon because Simeon had teased him while he was drunk and he directed Ramon to proceed to where Simeon was standing and attract his attention away from Iterio so that Iterio could shoot him without being detected by his intended victim; that Ramon did as directed and that Iterio approached to within a short distance of Simeon and shot him in the back; that Simeon uttered a cry and fell to the ground shot dead. The two defendants then took from Simeon's body his shoes and watch and conveyed the body into a cave where it was hidden from view and after about thirty minutes they emerged from the cave and the three returned to the cabin. Thereafter Joe and his father returned to their home at Kau, sleep-

Opinion of the Court.

ing the first night at the home of an Hawaiian by the name of Pohaku Papa on the government road in South Kona.

There is some other evidence which connects the defendants with the death of Simeon, the most important of which is the testimony of Antone Amarino, a police officer, to the effect that Iterio admitted to him that he had done wrong to the Hawaiian and made use in this conversation, which was in the Porto Rican language, of the word "kill;" and the further testimony of Antone Sanches that Iterio told him at Waialua, Oahu, that he (Iterio) had mistaken Simeon for a wild bull approaching through the brush and had shot him. Manuel Barques, another son of defendant Ramon, testified that he overheard this conversation.

On the other hand other facts and circumstances were brought out at the trial which point in the opposite direction, that is to say, the apparent lack of any motive for the killing; the fact that no trace of the remains of Simeon was ever found although the sheriff and other police officers were led by Joe to the situs of the alleged crime and to the very cave in which he claims to have seen his father and Iterio place the body of the deceased; the fact that the records of the teacher of the government school at Waiohinu where Joe was attending school show that at the time of Simeon's disappearance Joe was present in school at Waiohinu forty miles distant from South Kona; the extreme youth of the witness Joe and the fact that he first divulged his knowledge of the crime some two years after it is alleged to have been committed; the improbability of the testimony of the witness Sanches because he locates the village of Waialua on the Island of Oahu, where he claims to have had the conversation with Iterio, as being between Ewa and Honolulu, which is a geographical untruth. Another strange cir-

Opinion of the Court.

cumstance which has not been satisfactorily explained is the fact that when Joe and his father Ramon arrived at the main government road on their way home in the evening of the day it is claimed by Joe that Simeon was murdered Ramon delivered a letter written in good Hawaiian to one Kealoha Pauole. The letter purported to come from Iterio requesting Kealoha to advance a small sum of money to his brother Ramon. The evidence strongly indicates that none of the Porto Ricans could write the Hawaiian language hence this circumstance lends great strength to the testimony of the two defendants to the effect that Simeon wrote the letter for and at the request of Iterio at the time Ramon and Joe departed from the Hooper ranch on their return home, indicating that Simeon was alive at that time.

It must be assumed that the jury relied mainly upon the strength of the testimony of the youth Joe otherwise the defendant Ramon could not have been convicted at all and it is doubtful if Iterio could have been convicted of the crime of murder.

It is undoubtedly true that the testimony of Joe Barques established all the necessary elements of the offense charged, that is to say, the *corpus delicti* or body of the offense, the fact of death and the criminal agency of the defendants as the cause thereof. And irrespective of the other evidence it was solely for the jury to determine whether Joe was to be believed or not and it is not within the province of this appellate court to substitute its opinion for that of the jury respecting the credibility of the witnesses. This doctrine has been repeatedly adopted in this jurisdiction as well as in other jurisdictions. "Because there was evidence on which, if believed, a doubt of the defendants' guilt might be based, we cannot say that such doubt ought to have arisen, or that it was in fact produced in the minds of the jury. The

Opinion of the Court.

doctrine which in effect requires the opinion of the court to be substituted for that of the jury concerning the credibility of the evidence, even when guilt is claimed upon circumstantial evidence alone, is not accepted by this court as law" (*Territory v. Watanabe Masagi*, 16 Haw. 196, 226, 227). "The question for our determination, however, is, not whether we would or would not have convicted the defendant upon the evidence as disclosed by the record before us, but whether there was evidence sufficient to support the verdict as returned" (*Territory v. Chung Nung*, 21 Haw. 214, 217). The same principle was before the supreme court of California in the late celebrated case of *The People v. Mooney*, 177 Cal. 642. The California court there adopted the doctrine long prevailing in this Territory to the effect that the question whether or not a witness was telling the truth is a matter peculiarly for the jury and cannot properly be submitted to an appellate court. And to the same effect is the case of *Territory v. Alcantara*, 24 Haw. 197, 207, where the following language of Chief Justice Cooley in *People v. Garbutt*, 17 Mich. 9, 27, is quoted with approval: "The trial of criminal cases is by a jury of the country, and not by the courts. The jurors, and they alone, are to judge the facts and weigh the evidence. The law has established this tribunal because it is believed that from its numbers, the mode of their selection, and the fact that the jurors come from all classes of society, they are better calculated to judge of motives, weigh probabilities, and take what may be called a common sense view of a set of circumstances, involving both act and intent, than any single man, however pure, wise and eminent he may be. This is the theory of the law; and as applied to criminal accusations, it is eminently wise and favorable alike to liberty and justice. But to give it full effect the jury must be left to weigh the evi-

Opinion of the Court.

dence, and to examine the alleged motives by their own tests."

In the case at bar a jury of the country after a fair trial and upon evidence which the law recognizes as sufficient has found the defendants guilty of the murder of Simeon Kanui. If we could properly judge of the facts and weigh the evidence we might arrive at a different conclusion. The chief executive of the Territory, to whom final appeal can be made, may conclude that there is such a strong probability of a miscarriage of justice in this case as to warrant executive clemency to the defendants, but the inflexible rules of law place it beyond the province of this court to disturb the verdict of the jury.

The defendants' exceptions are overruled.

W. H. Beers, County Attorney of Hawaii, for the Territory.

H. G. Middleditch for the defendants submitted the case upon the briefs.

Syllabus.

CHARLES B. WILSON v. HEINRICH M. VON HOLT.

No. 1188.

EXCEPTIONS FROM CIRCUIT COURT FIRST CIRCUIT.

HON. J. T. DEBOLT, JUDGE.

ARGUED MAY 25, 1920.

DECIDED JUNE 15, 1920.

COKE, C. J., KEMP, J., AND CIRCUIT JUDGE FRANKLIN
IN PLACE OF EDINGS, J., ABSENT.

EVIDENCE—*hearsay*.

In replevin where the defense is that the chattel was being held as a pledge it does not violate the rule against admitting hearsay testimony to permit the plaintiff to recount a conversation which he had with a third party and the alleged pledgee explaining the delivery of the chattel.

TRIAL—*instructions to jury*.

All instructions given to the jury must be read together and whatever may be lacking in one instruction may be supplied by another.

OPINION OF THE COURT BY KEMP, J.

This suit was brought by the plaintiff Charles B. Wilson against the defendant Heinrich M. von Holt to replevin "one oil painting depicting the volcano of Kilauea by moonlight by Tavenier." It is alleged in substance that the plaintiff is the owner and entitled to the possession of said painting; that the defendant unlawfully withholds said property from his possession to his damage in the sum of \$1500, the reasonable value thereof, and that before the commencement of this action the plaintiff demanded of the defendant in writing the possession of said property which was refused. The defendant answered by general denial and gave notice that he would rely upon the statute of limitations.

Opinion of the Court.

Trial was had before a jury which rendered a verdict in favor of the plaintiff and the defendant brings exceptions.

Plaintiff produced sufficient evidence to warrant the jury in finding that he acquired title to the painting in question from one Barney Ordenstein in about 1890 and that he has not parted with the title then acquired; that he delivered said painting into the custody of Cecil Brown in 1897 or 1898 to sell and that the painting remained in Brown's possession for that purpose and for no other purpose until his death in 1917; that after the death of Cecil Brown and prior to the filing of this suit plaintiff demanded of the defendant Heinrich M. von Holt, who at that time had possession of the painting, that he (defendant) surrender possession of said painting to him (plaintiff) which was refused. The defendant produced evidence which tended to refute part of the case made by the plaintiff and to prove that Cecil Brown had had possession of said painting since about 1889; that he at first held it as security for a \$3000 note and later claimed to own it. It was further shown by the evidence, and the court charged the jury at defendant's request, that defendant is the executor of and trustee under the will of Cecil Brown, deceased; that said estate has not been distributed and if said painting was the property of Cecil Brown at the time of his death or if Cecil Brown had a right to the possession of said painting as against the plaintiff as security for a loan or otherwise then the defendant would be entitled to the possession of said painting and the verdict should be in his favor. Plaintiff denied that Cecil Brown ever held his note for \$3000 and denied that he ever agreed that the painting might be held as security for any indebtedness and testified that it was left in Brown's possession with the understanding, which Brown acknowledged as late as

Opinion of the Court.

1914, that it was being held for the purpose of sale and not as security for any debt.

The court gave all of the instructions requested by the defendant except one which was a request for a directed verdict in his favor. These instructions clearly and fairly submitted all of defendant's contentions to the jury, which found against him, and the verdict is amply supported by the evidence. If then there was no prejudicial error in the admission of evidence or instructions given at plaintiff's request, to which the defendant excepted, the exceptions must be overruled.

Plaintiff was permitted over defendant's objection to recount a conversation which he had with Tom James and Cecil Brown prior to the time the plaintiff says he let Brown have the painting. The painting was the subject of this conversation, which conversation was to the effect that James stated, "I see you have a picture," and requested plaintiff to let him take it to San Francisco where he believed he could sell it to the Bohemian Club in that city. Plaintiff testified that he hesitated about granting this request whereupon Brown volunteered the advice to let James take it and that he then acceded to James' request and instructed him to deliver the painting to Brown when he returned if he did not succeed in selling it. Plaintiff further testified that when James brought the painting back Brown said to him, "I am going up in a couple of weeks,—probably a month—to settle some hotel business in San Francisco. I will take it up and see what can be done with it—see if I can sell it," this last being in response to a question propounded to the plaintiff as to why he left the picture in Brown's possession from 1898 up to the time of his death. Defendant objected to the plaintiff being permitted to recount these conversations on the ground that they consisted of declarations in his own favor and are hearsay.

Opinion of the Court.

The objection was overruled and the defendant excepted. We think that these statements were merely a recounting of the circumstances under which Brown came into possession of the painting, the conversations being a part of the act of delivery of the painting into his possession, and are not, as argued by defendant, statements offered by plaintiff to prove his title. His title depended upon an entirely different state of facts testified to by plaintiff, which was practically, if not entirely, uncontroverted. If therefore the conversations were not strictly admissible the error in admitting them was harmless and not reversible error.

The defendant excepted to the giving of plaintiff's requested instructions Nos. 6, 11, 12 and 17. By instruction No. 6 the jury was told that before it could find that Cecil Brown, deceased, held the picture as a pledge for money that he had advanced to plaintiff it must find that the plaintiff agreed with said Cecil Brown that he (Cecil Brown) should hold the picture as security for the money and that if Mr. Brown obtained the picture for the purpose of selling it for plaintiff and then claimed to hold the same as security for plaintiff's indebtedness to him without the consent of plaintiff then it must find that the picture was not held by Cecil Brown during his lifetime as security for the payment of any money. Defendant's objection to this instruction is based on an extremely technical construction of the meaning of the phrase "and then claimed to hold the same as security for plaintiff's indebtedness," his argument being that under this instruction the claim of Brown that he held the painting as security must have arisen out of an agreement made at the time he secured possession of the picture and could not have arisen out of a subsequent agreement between him and the plaintiff. This construction we think is entirely unwarranted. The instruction contains

Opinion of the Court.

a single idea and that is that in order for the jury to find that Cecil Brown held the picture as security for a debt it must find that there had at some time been an agreement between him and the plaintiff to that effect. This is undoubtedly the law and the instruction was therefore proper.

The defendant criticizes instructions Nos. 11 and 12 because they do not set out that plaintiff must prove title as the basis of his right of possession and that they contain legal terms without definitions thereof and are therefore ambiguous and misleading, leaving questions of law to the jury. By instruction No. 11 the jury was told that if it believed from the evidence that plaintiff was entitled to possession of the painting and that defendant had it in his possession and that a demand had been made by plaintiff for its delivery, which was refused, to find for the plaintiff. In No. 12 it was told that in the absence of a possessory right shown to exist in another the general property in chattels draws to it the right of possession and that in such a case the plaintiff establishes his right to possession by showing a clear legal title; that title or complete ownership in plaintiff is not absolutely essential to the maintenance of the action, nor always sufficient, as the title may be in one person and the right to possession in another, and the right to possession controls. In other instructions the jury was told what facts would warrant its finding that the defendant had the right of possession even if it found that plaintiff owned the painting.

At the request of the defendant the jury was told that the plaintiff must recover, if at all, upon the strength of his own right of possession and not upon the weakness, if any, of the right of possession by the defendant; that where a chattel has been delivered as collateral security for a loan and the loan has not been paid said

Opinion of the Court.

chattel may not be recovered from the person holding the same though the statute of limitations has run against the debt; that if it should find from the evidence that the plaintiff became the owner of said painting and thereafter delivered it into the possession of Cecil Brown, who loaned money to him and held said painting with the consent of plaintiff as collateral security for said loan, then the verdict should be in favor of the defendant unless satisfied from the evidence that the debt for which said painting was held as security had been paid or otherwise discharged and that the mere fact that the books of Cecil Brown show that said indebtedness was written off and charged to the personal account of Cecil Brown or to profit and loss does not necessarily change the right of the defendant to the possession of the painting and that if it believed that said indebtedness existed as between the plaintiff and said Cecil Brown and that said picture was held as security therefor then the plaintiff cannot maintain this action without the payment of said indebtedness or the tender of the amount thereof to the said Cecil Brown or his legal representative.

It is a well recognized principle that all instructions given to the jury must be read together and whatever may be lacking in one instruction may be supplied by another. When the instructions given to the jury in this case are read in this manner we think that all the terms used by the court are easily understood.

In support of his contention that plaintiff having plead ownership must prove it and that the instruction to the effect that title or complete ownership in plaintiff is not essential is erroneous defendant relies upon *Hall v. Johnson*, 21 Colo. 414. From a careful reading of this decision we are unable to find anything in it inconsistent with the general rule which is correctly stated in the instruction. (34 Cyc. 1389.)

Opinion of the Court.

By instruction No. 17 the jury was told that if it believed from the evidence that Cecil Brown canceled all of the indebtedness of the plaintiff voluntarily before his death and thereafter held the picture merely for the purpose of selling it for plaintiff to find for the plaintiff. Under his exception to this instruction defendant contends that there is no evidence in the record on which to base this instruction and that the giving of an instruction based upon facts not in the record, even though such instruction is correct as an abstract proposition of law, is nevertheless reversible error. Conceding the correctness of the proposition of law contended for by the defendant we think the instruction was properly given for the reason that the very facts on which the instruction is based do appear in the record. The defendant has testified that Cecil Brown claimed to have been holding the picture as security for a three thousand dollar note. Another witness has testified that Mr. Brown had him charge off the plaintiff's account on his books and the plaintiff has testified that as late as 1914 Cecil Brown requested him to leave the picture in his possession a little while longer as he might at any time find a buyer for it. Under this state of testimony the jury might well have concluded that Cecil Brown did at one time hold the picture as security but had later released it and thereafter held it merely for the purpose of selling it for the plaintiff. The instruction is therefore not subject to the criticism made of it by the defendant.

The defendant further argues that the instruction contains a misstatement of the law and argues that even though the debt was canceled this would not release the picture which he contends was being held as security for the debt. Again conceding the correctness of defendant's contention as to the law we nevertheless hold the instruction as a whole correct. In all of his argument counsel

Syllabus.

for defendant ignores the latter part of the instruction which required the jury before rendering a verdict for plaintiff to find that Cecil Brown after the cancelation of the indebtedness held the picture merely for the purpose of selling it for plaintiff.

Our final conclusion is that all of the issues involved in the case were fairly submitted to the jury and that the verdict is amply supported by evidence.

The exceptions are therefore overruled.

W. B. Pittman (*Andrews & Pittman* on the brief) for plaintiff.

U. E. Wild (*Frear, Prosser, Anderson & Marx* with him on the brief) for defendant.

JOHN F. COLBURN III AND RICHARD H. TRENT
EXECUTORS UNDER THE LAST WILL AND
TESTAMENT OF JOHN F. COLBURN, DE-
CEASED *v.* UNITED STATES FIDELITY &
GUARANTY COMPANY.

No. 1227.

EXCEPTIONS FROM CIRCUIT COURT FIRST CIRCUIT.

HON. J. T. DEBOLT, JUDGE.

ARGUED JUNE 3, 1920.

DECIDED JUNE 30, 1920.

COKE, C. J., KEMP AND EDINGS, JJ.

INSURANCE—'accidental'—defined.

The term 'accidental' in its ordinary popular sense means a happening by chance or unexpectedly taking place and not according to the usual course of things nor as expected. If a result is such as follows from ordinary means voluntarily employed, in a not unusual or unexpected way, it cannot be called a result effected by accidental means, but if in the act which precedes the injury

Opinion of the Court.

something unforeseen, unexpected, unusual occurs which produces the injury the injury has resulted through accidental means.

SAME—accidental bodily injury.

Where blood poisoning results from an abrasion of the skin of the foot by a shoe and death or disability follows the death or disability is properly attributable to accidental bodily injury.

SAME—policy—forfeiture not favored.

The forfeiture of an insurance policy is not favored at law and courts are always prompt to seize hold of any circumstance to uphold the validity of a policy, and where it was issued and the premium therefor paid the validity of the policy should be sustained unless fraud or other dereliction upon the part of the insured sufficient in law to vitiate it is clearly shown.

OPINION OF THE COURT BY COKE, C. J.

This was an action brought in the circuit court of the first judicial circuit by John F. Colburn against the United States Fidelity & Guaranty Company, a foreign corporation, to recover \$440 on an accident policy which Colburn carried in the defendant company, issued by the defendant in his favor on the 2d day of November, 1917. The case after answer was tried before a jury which returned a verdict in favor of plaintiff for the full amount claimed. The defendant corporation comes here on a bill of exceptions. After the cause reached this court the plaintiff Colburn died and by order of court John F. Colburn III and Richard H. Trent, the executors under the will of John F. Colburn, deceased, were substituted in his place and stead as plaintiffs-appellees.

All of the exceptions presented in the bill of exceptions of the appellant may we think properly be resolved without discussion in favor of the appellees save exceptions Nos. 10, 11 and 13. In fact exceptions Nos. 11 and 13 are substantially to the same effect. The grounds forming the basis of the exceptions which we shall proceed to review may be summed up as follows: (1) That plaintiff cannot recover because he did not suffer an

Opinion of the Court.

accidental injury within the terms of the policy, and (2) that plaintiff is barred from recovery because of the breach of warranty by him as to material representations in the application for insurance.

The complaint after setting forth the terms of the policy and that it was delivered to Colburn by the defendant company alleges that on or about the 8th day of January, 1918, one of the feet of plaintiff, to wit, the right foot, became infected with blood poisoning which said injury so received by plaintiff as aforesaid, independently and exclusively of all other causes, continuously and wholly disabled and prevented plaintiff from the 8th day of January, 1918, to and including the 8th day of March, 1918, from performing any and every kind of duty pertaining to his occupation, that is to say, for the period of nine weeks, and thereafter partially disabled plaintiff for the period of four weeks and that plaintiff thereupon was entitled on account of said total and partial disability to receive from defendant the sum of \$440.

The evidence shows that early in January, 1918, the friction of an old slipper worn by the plaintiff unexpectedly produced an abrasion of the skin of one of his feet. This injury shortly thereafter became infected and caused blood poisoning which incapacitated plaintiff for the period above mentioned. It is the claim of the defendant that the injury as defined in the complaint does not fall within the term "accidental bodily injuries" within the meaning of the policy and therefore the terms of the policy would not apply to the disability. By the terms of the policy Colburn was insured against accidental bodily injuries. The Supreme Court of the United States in *Mut. Accident Ass'n v. Barry*, 131 U. S. 100, affirmed a judgment founded upon a verdict where death had resulted from bodily injuries effected through external, violent and accidental means and approved an instruction

Opinion of the Court.

to the jury that "The term accidental was used in the policy in its ordinary popular sense as meaning happening by chance, unexpectedly taking place, not according to the usual course of things, or not as expected; that, if a result is such as follows from ordinary means, voluntarily employed, in a not unusual or unexpected way, it cannot be called a result effected by accidental means; but that if, in the act which precedes the injury, something unforeseen, unexpected, unusual occurs which produces the injury, then the injury has resulted through accidental means."

Western Commercial Travelers' Ass'n v. Smith, 85 Fed. 401, is a case of remarkable similarity to the one at bar. The insured in that case, as in this one, suffered from blood poisoning which resulted from the abrasion of the skin of his toes caused by the friction of a shoe against his foot. The court there said: "Where blood poisoning results from an abrasion of the skin of a toe by a new shoe and death follows the death is properly attributable to 'bodily injury effected by external, violent and accidental means' within the meaning of an accident policy." Counsel for appellant while recognizing this as an authority against the position he has assumed cites *Mut. Accident Ass'n v. Barry*, *supra*, as an authority not in harmony with *Western Commercial Travelers' Ass'n v. Smith supra*. With this we cannot agree. There is nothing in the opinion in the *Barry* case which is at all in conflict with the opinion of the circuit court of appeals written by Judge Sanborn in the *Smith* case. On the contrary Judge Sanborn quotes from the opinion in the *Barry* case and each of these opinions is in entire harmony with the other.

We are convinced that the plaintiff Colburn suffered such an accidental and bodily injury as was contemplated by the accident insurance policy issued to him by the company.

Opinion of the Court.

The second question is whether the plaintiff is barred from recovery because of the breach of warranty by him as to material representations in his application for insurance. It cannot be doubted that at the time the policy and application were returned to Colburn the application contained misstatements of fact respecting material matters. That is to say, it contained a statement that Colburn had received no accidental indemnities from other companies; that no accidental health or life insurance policies had ever been refused him nor had any such policies ever been canceled. It was shown at the trial that these statements were untrue. The evidence of Colburn, however, is undisputed to the effect that he received the application for insurance from a Mr. Ellis, a San Francisco agent of the company, and that the application at that time contained about fifteen blank spaces. Colburn was instructed by Ellis to fill in his name, age, color and place of residence in the blank spaces for that purpose. With these instructions Colburn complied and returned the application to Ellis with all the other spaces left blank. In due course of time the policy to which the application was attached and made a part was returned to Colburn by Ellis together with a letter from Ellis. Colburn remitted the annual premium of \$40. There was some evidence given by Colburn in answer to a question propounded by the trial judge which would indicate that Colburn knew when he received the policy and application that all the blanks in the application were filled in. This evidence, however, the witness explained by the statement that when he received the policy and application with the letter he read the letter and taking it for granted that the policy and risk had been accepted he did not open the policy to see what was in it until the time he was preparing to make claim for his injury which is the basis of this suit; that the false

Opinion of the Court.

statements were not in the application when he signed it; that he was not the author thereof and had no information respecting the same until after his injury. A circumstance bearing out Colburn's statement is the fact that the answers which he admits he wrote into the application were all in his handwriting, while all of the other answers, including the false statements above referred to, were typewritten. Whether the false statements were inserted in the answer by Ellis or by some other representative of the company at its head office is left to conjecture, but the fact remains that Colburn denied their authorship as well as any knowledge thereof and the jury must have been convinced of the truth of his statement.

Counsel for appellant relies with confidence upon the rule announced in *N. Y. Life Ins. Co. v. Fletcher*, 117 U. S. 519, to overcome the judgment herein. The facts in that case, however, are dissimilar to those of the case at bar. In the *Fletcher* case the false information was written into the application by an agent of the company and the application containing the false information was signed by the insured. There was a clause in the application stipulating that the rights of the company could not be affected by verbal statements either of the insured or of the agent. When the policy was returned to the insured upon it was indorsed in red type conspicuously printed the following notice: "For the information of the assured and in order that any unintentional errors or omissions which may hereafter be found to exist may be corrected an abstract of the application upon which this policy is based may be found in the third page within. If corrections are desired, when satisfactory to the company, a certificate to that effect will be issued over the signature of the president and actuary." Under these circumstances the court held that it was the duty of the insured to have read over the application at the time he signed it and failing to do this the indorsement

Opinion of the Court.

in red ink upon the policy was sufficient to impose upon him the duty to inspect the application.

It is urged by defendant that its instructions numbered 7 and 12 should have been given to the jury and that error was committed by the trial court in refusing to give them. The effect of these instructions was to advise the jury that in determining whether or not the plaintiff was bound by the statements in the application regarding his having received no accident indemnities from other companies and also his never having been refused insurance by such companies and that no policy held by him had ever been canceled it was proper for it to consider whether or not at the time plaintiff paid his initial premium he knew that the application contained misstatements of fact respecting material matters and if the jury should find that the plaintiff when he received the insurance policy from the San Francisco agent of defendant knew that the same contained any such misstatements of fact and that plaintiff accepted the policy notwithstanding and thereafter paid his initial premium on the same then the plaintiff should be held to have ratified said misstatements and adopted them as his own and the verdict should be for the defendant. These instructions correctly state the law, but as we read the transcript of the evidence they are not justified by it. As mentioned above, the testimony of Colburn was to the effect that he did not examine the policy at the time he received it and knew nothing of its contents or of the false information in the application until after his injury. His testimony is capable of no other construction.

Instructions Nos. 7 and 12 were therefore properly refused by the trial court because not based upon any fact appearing in the record.

There is a pronounced tendency in many of the state courts to depart from the strict rule adhered to by the Federal Supreme Court in the *Fletcher* case, *supra*.

Opinion of the Court.

and *Northern Assurance Co. v. Building Ass'n*, 183 U. S. 308, respecting the lack of authority of an insurance agent to vary the contract or waive any of its conditions. See *State Mut. Ins. Co. v. Craig*, 111 Pac. 325. Cooley's *Briefs on the Law of Insurance*, Vol. 7 Suppl., Sec. 2555a and succeeding sections contains a valuable collection of the authorities in reference to the subject under discussion. We are of course bound by the decisions of the United States Supreme Court, but even applying the doctrine of that court to the case at bar we still must uphold the verdict herein. The forfeiture of an insurance policy is not favored at law and courts are always prompt to seize hold of any circumstance to uphold the validity of a policy and where a policy has been issued and the premium therefor paid the validity of the policy should be sustained unless fraud or other dereliction upon the part of the insured, sufficient in law to vitiate it, is clearly shown. In the present case when the policy and application were returned to the insured these two documents taken together covered over sixteen pages of manuscript. We do not think the burden was upon the insured to carefully scan the application to ascertain whether false answers had been inserted therein over his signature, by a representative of the company, which might prevent recovery in case he suffered an accident. It is shocking to the sense of right and fair dealing for an insurance company to obtain the premiums of an insured year after year and then if perchance it is called upon to make good a loss to attempt to escape liability by pleading a forfeiture of the policy by reason of some technical error, of which it was the author, either in the application or the policy itself.

The exceptions are overruled.

W. B. Pittman (*Andrews & Pittman* on the brief) for plaintiff.

W. B. Lymer for defendant.

Syllabus.

IN THE MATTER OF THE APPLICATION OF
E. R. BEVINS FOR A WRIT OF HABEAS
CORPUS.

No. 1278.

ORIGINAL.

ARGUED JUNE 26, 1920.

DECIDED JULY 2, 1920.

COKE, C. J., KEMP AND EDINGS, JJ.

CONTEMPT—*record*.

A recital in the mittimus that the accused "in a contemptuous and insulting manner * * * made certain statements intimating, and intending to intimate, the incompetency of the judge," etc., is not a compliance with the provisions of section 4056 R. L. 1915 which provides that "Whenever any person shall be adjudged guilty of any contempt or sentenced therefor, the particular circumstances of the offense shall be fully set forth in such judgment and in the order or warrant of commitment."

SAME—*same*.

The language itself should be set out in the mittimus to enable the reviewing court to determine whether the judge of the court below properly assumed that the petitioner intimated, or intended to intimate, the incompetency of the judge.

SAME—*legislative authority*.

The right to punish for direct contempt is inherent in every court of record and it is doubtful if that right can be taken away by legislative enactment, but the procedure is purely statutory and compliance with the statute in respect thereto must be had.

OPINION OF THE COURT BY COKE, C. J.

The petitioner, E. R. Bevins, an attorney at law, was adjudged guilty of direct contempt of court by the judge of the circuit court of the second judicial circuit and was sentenced to pay a fine of \$50 and in default of the payment thereof was ordered to be imprisoned for a period not to exceed thirty days. The fine was not paid

Opinion of the Court.

and a warrant of commitment was issued by the court directing the high sheriff, his deputy, or the sheriff of the County of Maui or his deputy to take Bevins into custody and to cause the sentence to be executed. After being taken into custody Bevins obtained a writ of habeas corpus from the chief justice of this court. The deputy high sheriff, Mr. Gleason, made return to the writ setting forth that the petitioner Bevins was held by him under and by virtue of a mittimus issued out of the circuit court, a copy of which was attached and made a part of the return. The petitioner has interposed a demurrer to the return of the officer. The grounds of the demurrer as contained in the second paragraph thereof are as follows: "That the mittimus under which said respondent Patrick Gleason attempts to justify the restraint and imprisonment of petitioner fails to set forth the particular circumstances of the offense on the commission of which petitioner was committed contrary to the provisions of section 4056 of the Revised Laws of Hawaii, 1915." That portion of section 4056 R. L. 1915 applicable to the matter under consideration provides that "Whenever any person shall be adjudged guilty of any contempt or sentenced therefor, the particular circumstances of the offense shall be fully set forth in such judgment and in the order or warrant of commitment."

The only question therefore for this court to determine is whether the recital in the mittimus is a sufficient compliance with the statute requiring the particular circumstances of the offense to be fully set forth in the warrant of commitment. The mittimus recites that the petitioner "in a contemptuous and insulting manner * * * made certain statements intimating, and intending to intimate, the incompetency of the judge of said court to hear and determine a certain case." It is quite obvious that the manner in which language is used is

Opinion of the Court.

often entirely impossible of description and the impossible is never expected. But in the mittimus before us it is not only recited that the petitioner made certain statements in a contemptuous and insulting manner but that by the statements he intimated, or intended to intimate, the incompetency of the judge to hear and determine a case then pending before him. It is the sum total of all of these things which constituted the contempt. Under these circumstances the statutory requirement that the particular circumstances of the offense be set forth in the mittimus has not been complied with. The statements made by petitioner should be contained in the mittimus so that this court may determine whether the judge of the court below properly assumed that the petitioner by the use of the language intimated or intended to intimate the incompetency of the judge. *In re Vivas*, 18 Haw. 670, Chief Justice Hartwell ordered the release of the prisoner because the mittimus did not state the circumstances of the contempt, which he held to be a peremptory statutory requirement. In *Ogden v. State*, 93 N. W. 203, the opinion is summed up in the syllabus as follows: "A recital that accused addressed insulting and menacing language to the court is a mere conclusion. The language itself should be set out to enable the reviewing court to determine whether it was actually contemptuous." And in *Crites v. State*, 105 N. W. 469, the court reviewing a summary proceeding to punish an alleged contempt committed in the presence of the court made use of the following language: "In such a case it is absolutely necessary for the preservation of the liberties of the citizen that in recording a conviction the court shall state the facts showing the contempt charged. It is not sufficient to state in a general way the conclusions of fact on which the conviction is based. The facts themselves must be stated from which the reviewing court

Syllabus.

can see that the ultimate fact of guilt is properly and justly found." The right to punish for direct contempt is inherent in every court of record and it is doubtful if that right can be taken away by legislative enactment, but the procedure is purely statutory and compliance with the statute in respect thereto must be had.

In the present case the mittimus by failing to set forth the particular circumstances of the offense does not meet the requirements of the statute, hence the petitioner must be discharged from custody and it is so ordered.

E. C. Peters and *H. R. Hewitt* (*Peters & Smith* on the brief) for petitioner.

H. Irwin, Attorney General, for respondent.

IN THE MATTER OF PABLO MANLAPIT, A PRACTITIONER OF THE DISTRICT COURTS OF THE TERRITORY OF HAWAII.

No. 1264.

APPEAL FROM CIRCUIT JUDGE FIRST CIRCUIT.

HON. J. T. DEBOLT, JUDGE.

ARGUED JUNE 14, 1920.

DECIDED JULY 3, 1920.

COKE, C. J., KEMP AND EDINGS, JJ.

ATTORNEY AND CLIENT—*suspension and disbarment—parties.*

A proceeding under Act 19 S. L. 1919 to disbar a district court practitioner may be instituted by the attorney general and his complaint may be verified upon information and belief.

SAME—*same—relation of attorney and party aggrieved.*

The relation of attorney and client need not exist between the attorney and the party aggrieved in order to make the misconduct of the attorney ground for disbarment.

Opinion of the Court.

SAME—same—nature of act charged.

The act with which the attorney is charged as ground for disbarment must be of such a nature as to reflect upon his professional character but need not constitute a criminal offense.

SAME—same—same.

Any act which imports fraud or dishonesty on the part of an attorney or any other gross misconduct which would reflect upon his professional character constitutes sufficient grounds for disbarment.

SAME—same—sufficiency of complaint.

The complaint in this case does not allege facts sufficient to charge the respondent with fraud or deceit or other gross misconduct meriting disbarment.

OPINION OF THE COURT BY KEMP, J.

(Coke, C. J., dissenting.)

On March 2, 1920, the petition of J. Lightfoot, acting attorney general of the Territory of Hawaii, was filed in the circuit court of the first judicial circuit praying that a rule be entered against Pablo Manlapit to show cause why his name should not be stricken from the roll of attorneys of the district courts of said Territory because of his unfitness to be trusted with the power of an attorney. The gravamen of the complaint is that on or about the 19th of January, 1920, the said Pablo Manlapit, being then the president of the Filipino labor federation, caused to be issued over his name as president of the said Filipino labor federation an order requiring all the members of the said Filipino labor federation to strike and cease working upon the sugar plantations situate on the Island of Oahu for the alleged end and purpose of forcing the owners of said sugar plantations to increase the rate of wages paid to laborers on said plantations and that pursuant to said order a large number of Filipinos usually employed in the sugar industry on the Island of Oahu were on strike; that on or about the said 19th day of January the firm of Thompson, Cathcart & Lewis.

Opinion of the Court.

local attorneys, was specially retained to represent the Hawaiian Sugar Planters' Association, a voluntary association exercising a general advisory control over the sugar plantations within the Territory of Hawaii in regard to the general policy of conducting the sugar business in the Territory of Hawaii; that it was agreed between the said firm of Thompson, Cathcart & Lewis and Mr. R. D. Mead, secretary of, and acting for, the Hawaiian Sugar Planters' Association, that Mr. F. E. Thompson, the senior member of said firm, should make inquiries in regard to the activities of said Filipino labor federation and keep the said Hawaiian Sugar Planters' Association advised of the activities of the officers of said federation and of the members thereof; that in pursuance of said retainer the said F. E. Thompson during all of the times hereinafter mentioned acted under the terms thereof; that on or about the 26th day of January, 1920, the said Pablo Manlapit solicited, and thereafter on the same day had, an interview with the said F. E. Thompson, at which interview said Manlapit stated in effect that realizing the strike called by him could not be much longer maintained he, the said Pablo Manlapit, wanted to see what could be done with the said F. E. Thompson, as attorney for the Hawaiian Sugar Planters' Association, looking to the termination of said strike and the return of the members of the Filipino labor federation to their work on the sugar plantations on said Island of Oahu; that after some preliminary conversation the said Pablo Manlapit stated that if he, the said F. E. Thompson, acting for the Hawaiian Sugar Planters' Association, would give him, the said Manlapit, the sum of \$50,000 he, the said Manlapit, would call off and determine the strike in the morning (meaning the morning of the 27th of January, 1920); that said F. E. Thompson then and there refused to give

Opinion of the Court.

the said Pablo Manlapit the said sum of \$50,000 or any other sum, whereupon said Pablo Manlapit said in effect that anybody would take a chance at making \$50,000 and closed the interview. It is further alleged that said request for the payment of the sum of \$50,000 to him was made by said Pablo Manlapit for the purpose and intention of wrongfully acquiring for his own personal gain from the said Hawaiian Sugar Planters' Association the sum of \$50,000 by calling off the said strike of the said Filipino labor federation.

Upon the filing of this petition a rule was entered requiring the respondent Pablo Manlapit to answer the facts so alleged against him and to show cause on or before the 4th day of March, 1920, at 2 o'clock p. m. why his name should not be stricken from the roll of attorneys because of his unfitness to be trusted with the power of an attorney of said court. In response to this order the respondent demurred, the grounds of demurrer being: (1) That said petition fails to state facts sufficient to charge the respondent with any offense against the laws of the Territory of Hawaii; (2) that said petition fails to set forth facts sufficient to constitute malpractice or any other offense giving the court jurisdiction herein; (3) that there is a misjoinder of necessary parties herein in that it fails to show that any party aggrieved by any act of malpractice complains of the respondent; (4) that it does not appear in and by said petition that the relation of attorney and client existed between the Filipino labor federation and the respondent at any time. The demurrer was overruled and the respondent comes to this court on an interlocutory appeal allowed by the circuit judge.

Under the demurrer counsel for respondent has argued several questions which we will notice. It is contended that before he may be compelled to answer there should

Opinion of the Court.

be a complaint by the party aggrieved supported by his affidavit as to the truth of the allegations and that the complaint of the attorney general sworn to on information and belief is not sufficient to require him to answer. Fortunately the necessity for disbarment proceedings has not often arisen in this jurisdiction and local precedent is therefore limited, but a reference to the files of this court discloses that all of the more recent disbarment proceedings involving attorneys of this court were instituted by the attorney general and that the complaint in each case was sworn to by the attorney general on information and belief. In the case of *In re Davis*, 15 Haw. 377, it was decided that a complaint by the party aggrieved is not necessary and that in such a case an information may be filed by the attorney general. See also *In re Achi*, 8 Haw. 216. The character of verification required was not discussed in these cases but if the attorney general may institute the proceeding he must of necessity be permitted to verify his complaint on information and belief as in most cases he would only possess that character of knowledge of the facts. Act 19 S. L. 1919, which provides for the licensing of practitioners in the district courts of the Territory and for their punishment and disbarment, provides that "Said practitioners shall be summarily amenable to the courts of record, and may be fined, imprisoned or dismissed from the roll of practitioners for satisfactory cause, upon the complaint of any party aggrieved by their malpractice, or for non-payment of moneys collected by them for private parties, or for any deceit or other gross misconduct." This provision is in exactly the same language found in section 2331 R. L. 1915 relating to the punishment and disbarment of practitioners in this court and was enacted after the decisions above referred to which construed section 2331. We think that the enactment of this provision

Opinion of the Court.

under these circumstances constituted a legislative approval of the decisions above cited. We therefore hold that under this statute the disbarment proceeding may be instituted by the attorney general and that the complaint may be verified by him upon information and belief.

It is also contended that the acts complained of must relate to the attorney's professional character and that those affecting his character as a man of integrity as a private citizen are not sufficient ground for instituting disbarment proceedings against him. It is further contended that it must appear that the relation of attorney and client existed between the attorney and the party aggrieved. In *Ex parte Wall*, 107 U. S. 265, 273, it is said: "It is laid down in all the books in which the subject is treated that a court has power to exercise a summary jurisdiction over the attorneys to compel them to act honestly towards their clients, and to punish them by fine and imprisonment for misconduct and contempts, and, in gross cases of misconduct, to strike their names from the roll. If regularly convicted of a felony an attorney will be struck off the roll as of course, whatever the felony may be, because he is rendered infamous. If convicted of a misdemeanor which imports fraud or dishonesty the same course will be taken. He will also be struck off the roll for gross malpractice or dishonesty in his profession, or for conduct gravely affecting his professional character. In Archbold's Practice, edition by Chitty, p. 148, it is said: 'The court will in general interfere in this summary way to strike an attorney off the roll, or otherwise punish him, for gross misconduct, not only in cases where the misconduct has arisen in the course of a suit, or other regular and ordinary business of an attorney, but where it has arisen in any other matter so connected with his professional character as

Opinion of the Court.

to afford a fair presumption that he was employed in or intrusted with it in consequence of that character.'” From this it would appear that the relation of attorney and client need not exist between the attorney and the party aggrieved in order to make the misconduct of the attorney ground for disbarment but the act with which he is charged must be of such a nature as to reflect upon his professional character. If an attorney may be disbarred because convicted of a misdemeanor which imports fraud or dishonesty we see no reason why he should not be disbarred for acts which import fraud or dishonesty although they may not constitute a criminal offense. Any act which imports fraud or dishonesty on the part of an attorney necessarily reflects upon his professional character. Any other gross misconduct which would reflect upon an attorney’s professional character would also constitute sufficient grounds for disbarment.

The most serious question presented in this case is whether the facts charged against the respondent, when tested by the above principle, constitute sufficient grounds for striking his name from the roll. He is in effect charged with having a conversation with F. E. Thompson, of the firm of Thompson, Cathcart & Lewis, an attorney of this court employed by the Hawaiian Sugar Planters’ Association, in which the respondent in his capacity as president of the Filipino labor federation proposed to call off and terminate an existing strike for the sum of \$50,000; that when his proposal was refused he remarked that any one would take a chance on making \$50,000 and closed the interview. No facts are alleged which would indicate that any fraud or deceit was used or attempted or that had the Hawaiian Sugar Planters’ Association elected to accept his proposition he would not or could not terminate the strike.

It is not alleged that the respondent misrepresented

Opinion of the Court.

any fact or misrepresented his authority to act for the strikers. In fact the idea is negatived by the allegation that the proposal was made for the purpose of wrongfully acquiring the sum of \$50,000 from the Hawaiian Sugar Planters' Association "by calling off the strike." The effect of this allegation is that had his proposal been accepted by the planters and the money paid the respondent intended to render, and would have rendered, the service for which he was asking payment. Under this state of facts no fraud was perpetrated and none attempted against the planters, neither does it appear that any fraud against the labor federation, for which respondent purported to act, was contemplated, much less accomplished. How, we may ask, was the money to be wrongfully acquired? There are no facts stated in the complaint by which we can judge that the money would have been wrongfully acquired had his proposal been accepted. An allegation, therefore, that he intended to wrongfully acquire it is a mere conclusion of the pleader and cannot be answered by the respondent. The attorney general's attempt to liken respondent's proposal to soliciting a bribe has not impressed us as sound and the authorities cited are therefore not in point. The respondent no doubt had a very fanciful idea of the liberality or gullibility of the sugar planters' association and its attorney otherwise his proposal would never have been made, but so far as his conduct is disclosed by the allegations of the complaint all semblance of fraud and deceit is lacking and no gross misconduct is shown.

Our conclusion is that the facts charged against the respondent in the complaint do not constitute a sufficient ground for striking his name from the roll and the demurrer should have been sustained.

For the reasons herein the order overruling the demurrer is reversed and the cause remanded.

Opinion of Coke, C. J.

J. Lightfoot, Deputy Attorney General, for petitioner.

R. J. O'Brien (*Andreus, Pittman & O'Brien* on the brief) for respondent.

DISSENTING OPINION OF COKE, C. J.

I cannot agree with the conclusions reached in the foregoing opinion holding that the demurrer to the petition should be sustained. Gross misconduct is one of the grounds specified in Act 19 S. L. 1919 for which an attorney may be dismissed from the roll of practitioners and includes all wrongful or improper conduct made conspicuous because of the gravity of the misdeed.

It appears from the petition herein filed by the attorney general that the respondent Manlapit was the president of the Filipino labor federation; that he offered to call off the strike of Filipino laborers if the representative of the Hawaiian Sugar Planters' Association would pay him the sum of \$50,000; that upon his offer being declined he stated that anybody would take a chance at making \$50,000. It is further alleged in the petition that Manlapit's purpose and intention were to wrongfully acquire for his own personal gain from the Hawaiian Sugar Planters' Association the sum of \$50,000.

I am of the opinion that these allegations sufficiently set forth gross misconduct. It seems to me that they clearly divulge an attempt on the part of Manlapit to corruptly use his office as president of the Filipino labor federation to enrich himself to the extent of \$50,000. This I think constituted gross misconduct on his part. In order to lay the basis for a disbarment proceeding it is not necessary that the attorney's misconduct should be such as would make him liable to criminal prosecution. If it be shown that he is unfit to discharge the duties of his office or that he is unworthy of confidence,

Syllabus.

even though the conduct is outside of his professional dealing, it is sufficient. If an attorney is not moral or is not of good demeanor he may be disbarred. The license which he bears is a badge of respectability—a patent of trustworthiness—and he ought not to be permitted to retain his license if he is shown to be unworthy of it.

The allegations of the petition divulge conduct and turpitude on the part of the respondent sufficiently gross to put him on trial at the bar of the court below.

TERRITORY *v.* MANU MAKANOA, ET AL.

No. 1248.

EXCEPTIONS FROM CIRCUIT COURT FIRST CIRCUIT.

HON. C. S. FRANKLIN, JUDGE.

SUBMITTED JUNE 30, 1920.

DECIDED JULY 7, 1920.

COKE, C. J., KEMP AND EDINGS, JJ.

COURTS—district courts—jurisdiction in criminal cases where title to real estate may be involved.

Section 2297 R. L. 1915 which provides that district courts shall not have cognizance of real actions nor actions in which the title to real estate shall come in question, as amplified by Rule 15 of the supreme court, has application solely to civil cases.

OPINION OF THE COURT BY COKE, C. J.

The defendants Manu Makanoa, Pua Haaheo, Kolo-wena, Sam Kukapu, Miss Loika, Miss Kamaka, Amœ (w), Waiahao (w) and Lino (w) were brought to trial before the district magistrate of Koolauloa, City and

Opinion of the Court.

County of Honolulu, on a warrant charging them with the violation of a vested fishing right. The offense is covered by section 621 R. L. 1915 which makes it a misdemeanor for any person to appropriate to himself any fish which the owner or lessee of a vested fishing right has set apart for himself, etc. When the case came on for trial before the district magistrate the defendants interposed a plea, which was supported by affidavit, to the jurisdiction of the court, averring that the title to real estate was involved. The plea was overruled and at the conclusion of the trial the defendants were convicted. From the judgment of conviction the defendants appealed to the circuit court where their plea to the jurisdiction of the district magistrate was again urged. The circuit judge determined the question adversely to the defendants and from his ruling the cause has come here on an interlocutory exception.

Section 2297 R. L. 1915 provides that district courts shall not have cognizance of real actions nor actions in which the title to real estate shall come in question and this section is amplified by Rule 15 of the supreme court. Both of the courts below held that the statute and the rule of court have application solely to civil causes. There can be no doubt of the correctness of this view. It would indeed be an anomaly should a defendant in a criminal case be able to oust the district court of jurisdiction by merely setting up by affidavit that the title to real estate was involved in the proceeding.

The exception is overruled.

Thompson, Cathcart & Lewis for the Territory.

W. C. Achi for defendants.

Opinion of the Court.

IN THE MATTER OF THE APPLICATION OF HENRY VAN GIESEN, BERTHA A. ROONEY (WIDOW), FLORENCE VAN GIESEN, BERNICE CLARK WEIGHT, HARRY A. WEIGHT, ERNEST C. HEINE, HATTIE HEINE, M. MIURA, A. UEDA AND S. OGATA FOR A WRIT OF PROHIBITION AGAINST HONORABLE WILLIAM C. ACHI, JR., JUDGE OF THE CIRCUIT COURT OF THE FIFTH JUDICIAL CIRCUIT, TERRITORY OF HAWAII, AND SAMUEL KELIINOI.

No. 1280.

ORIGINAL.

ARGUED JULY 2, 1920.

DECIDED JULY 10, 1920.

COKE, C. J., KEMP AND EDINGS, JJ.

OPINION OF THE COURT BY COKE, C. J.

This is an original proceeding commenced in this court by petition for a writ of prohibition to restrain the respondents from enforcing or attempting to enforce a temporary injunction issued out of the circuit court of the fifth circuit by the judge of said court on the application of the respondent Keliinoi which enjoined the petitioners herein from nullifying certain contracts existing between Keliinoi and the petitioners herein for the cultivation of cane on the homestead lots of said petitioners at Kapaa on the Island of Kauai. The contracts in question are of like tenor and read as follows:

“This agreement made and entered into this 13th day of November, A. D. 1918, by and between of Kapaa, County of Kauai, Territory of Hawaii, party of the first part, hereinafter called the Employer, and

Opinion of the Court.

Samuel Keliinoi, of Waimea, said County of Kauai, party of the second part, hereinafter called the Employee; Witnesseth:

That in consideration of the covenants, terms and premises hereinafter set forth from either party to the other moving, the said employer does hereby agree to have the said employee plant, cultivate, bring to maturity and harvest sugar cane on Lots Nos. ... and ..., Kapaa Homesteads, Series Four, Kawaihau, County of Kauai, Territory of Hawaii, and more particularly described in Special Homestead Agreement No., for three (3) consecutive crops of fully matured sugar cane from date hereof, provided the approval of the Commissioner of Public Lands and of the Governor of Hawaii are first hereto attached.

The said employer further agrees to pay to the said employee for the labor on said lots as above mentioned seventy-five per centum (75%) of the net proceeds, i. e. after all expenses incurred in the planting, care, cultivation, harvesting, etc., from the sale of the first crop; and fifty-five per centum (55%) for each of the succeeding two crops. The division thereof shall be made within three (3) months from the date of the sale of the crop. The said parties herein hereby agree that the tonnage as credited to the said employer by the purchaser of said sugar cane shall be the basis of settlement.

The said employee hereby covenants and agrees, in consideration of the above, to at once commence working the aforesaid lots, and to care for and cultivate the said land, and to keep the same in husbandlike manner at all times henceforth until the termination of this agreement, and to do the same to the entire satisfaction of the said employer; and that all work, labor and services to be performed by the said employee under this agreement shall be subject to the supervision and shall be done to the entire satisfaction of the said employer in all cases.

The said employee further agrees that he shall furnish all necessary implements and material that in the judgment of the said employer may be required in the carrying out of the conditions of this agreement.

Opinion of the Court.

The said employee further agrees that he will not transfer his interest under this agreement or any portion thereof to another without first obtaining the written consent of the said employer in default of which, and furthermore in default of any or all of the conditions heretofore stipulated, the said employer may at option terminate this agreement after making settlement with the said employee for the work or services to date rendered within the meaning of this agreement contained.

In Witness Whereof the said parties hereto have set their hands and seals the day and year first above written."

The petitioners were endeavoring to effect a forfeiture of the contracts and Keliinoi filed in the circuit court of the fifth circuit a bill in which among other things he sought to temporarily restrain the petitioners from terminating or attempting to terminate the contracts. The temporary injunction was issued by the court and it is to prevent the enforcement thereof that these petitioners have sued out this writ of prohibition. The judge of the court below demurred to the writ while the respondent Keliinoi has interposed an answer. Counsel for the petitioners has conceded in his oral argument before us, and we think properly so, that his clients are entitled to the relief now sought, if at all, solely because the contracts between the petitioners and Keliinoi are for personal labor and service and for that reason come within the interdiction of section 10 of the Organic Act (R. L. 1915 p. 28) which reads: "Provided that no suit or proceedings shall be maintained for the specific performance of any contract heretofore or hereafter entered into for personal labor or service, nor shall any remedy exist or be enforced for breach of any such contract, except in a civil suit or proceeding instituted solely to recover damages for such breach."

The contracts speak for themselves. Under them Ke-

Syllabus.

Keliinui is entitled to the possession of the property and enjoys the control and management of the enterprises limited only by the right of the petitioners to require that he cultivate and care for the crops in a husband-like manner. The elements of a contract for personal labor or service are entirely lacking in the agreements between the parties hence the provisions of section 10 of the Organic Act have no application. See *Heebner v. Chave*, 5 Pa. St. 115; *Shelly v. Smith*, 59 Ia. 453; *Smith v. Brooke*, 49 Pa. St. 147.

The writ is discharged.

W. B. Pittman (*Andrews, Pittman & O'Brien* on the brief) for petitioners.

W. C. Achi Sr. for respondent Achi.

L. A. Dickey for respondent Keliinui.

MORRIS ROSENBLEDT, TRUSTEE FOR EVA McCLELLAN, LILY NAUELE BRANDT AND OTILIA ROBINSON, v. ERNEST H. WODEHOUSE, M. A. ROBINSON AND WILLIAM CHAMBERLAIN, TRUSTEES UNDER THE WILL AND OF THE ESTATE OF BATHSHEBA M. ALLEN, DECEASED; LENA K. DYKES AND T. BRANDT.

No. 1246.

ERROR TO JUDGE OF THE LAND COURT.

HON. J. T. DEBOLT, JUDGE.

ARGUED JUNE 17, 1920.

DECIDED JULY 14, 1920.

COKE, C. J., KEMP AND EDINGS, JJ.

APPEAL AND ERROR—law of the case—decision on reserved questions.

The rule generally referred to as the law of the case does not apply to interlocutory decisions and decisions on reserved ques-

Opinion of the Court.

tions so as to prevent this court from re-examining the same question when the case comes before it on a subsequent appeal.

DEEDS—construction.

In case of a grant to "E, her lawfully begotten children, their heirs and assigns," without such words as "after her decease" and E has no children at the time of the grant, the words "lawfully begotten children" become words of limitation and at common law E would take an estate tail.

SAME—same.

But since estates tail cannot be created or exist here E will be held to take an estate in fee simple unless in order to give effect to other provisions of the deed a different holding is necessary.

SAME—same.

Where such deed contains an additional provision forbidding E from selling the land it will more nearly carry out the expressed intention of the grantor to hold that E took a life estate with remainder in fee to her lawfully begotten children.

OPINION OF THE COURT BY KEMP, J.

The petitioner Morris Rosenbledt as trustee for three of the lawfully begotten children of Elizabeth Hart (nee Wond) filed his petition in the land court in which he claimed title to an undivided $\frac{3}{7}$ interest in the land described in the petition and sought to have his title to said undivided interest registered. The respondents, trustees under the will and of the estate of Bathsheba M. Allen, deceased, appeared and claimed an undivided interest in said lands somewhat in conflict with the claim of petitioner. Other respondents made claims partly in conflict with the claim of the trustees of the Allen estate. Questions of law were reserved to this court by the judge of the land court and in the opinion reported in 24 Haw. 298 it was held that only the title of the petitioner could be registered in this proceeding and that the conflicting claims of the various respondents could not be adjudicated therein. It was also held that

Opinion of the Court.

Elizabeth took an estate in fee simple in said land by the deed under which all the parties claim and the land court acting upon the advice thus given it decreed that the petitioner had title to an undivided $\frac{3}{9}$ interest in said land. From this decree the petitioner comes to this court on writ of error.

The first question to be determined is whether the former opinion of this court on the reserved questions holding that Elizabeth took an estate in fee simple is now the law of the case and as such binding upon us, or are we at liberty to reexamine that question and if we come to a different conclusion to disregard our former opinion.

There is no contention that the decree entered is erroneous provided the deed in question conveyed to Elizabeth an estate in fee simple, as formerly held by this court. If therefore the holding that Elizabeth took an estate in fee simple in said land is now the law of the case there is nothing before us open for review. Petitioner has cited the *City of Hastings v. Foxworthy*, 63 N. W. 955, as a leading case supporting his contention that the doctrine generally referred to as the law of the case should not be recognized. That question was recently before this court and we held with a majority of the state courts and the Supreme Court of the United States that a question decided when a case is before us on appeal will not be reexamined when the same case again comes before us on a subsequent appeal. (*Wong Wong v. Skating Rink*, 25 Haw. 347.)

But the plaintiff in error contends that inasmuch as an opinion on reserved questions merely advises the court reserving the questions to this court what the law on some abstract question is such an opinion does not fall within the rule under discussion. In *Lewers & Cooke v. Atcherly*, 222 U. S. 283, 295, it is said: "The decree

Opinion of the Court.

overruling the demurrer of the defendant to the bill of the Kapiolani Estate also is relied upon. But as that case has not passed to a final decree, and the defendant bought the land in controversy *pendente lite*, it can stand no better than its vendor the party to the suit. * * * If that case instead of this had been prosecuted to final decree there was nothing in its former action to hinder the Supreme Court from adopting the principle now laid down, even though it thereby should overrule an interlocutory decision previously reached." If an interlocutory decision previously reached does not fall within the rule under discussion it would appear that with more reason it ought to be held that a decision rendered on reserved questions might be overruled when the case in which the question was reserved comes before us on appeal, and under the circumstances of this case, to which we will now refer, we think it entirely proper for us to reexamine the question of the proper construction of the deed in question and reach a conclusion independent of what was heretofore held.

When the matter was here on reserved questions the petitioner contended that Elizabeth took a life estate with remainder in fee simple to her lawfully begotten children who might survive her, that is, that the remainder was contingent upon their survival. At that time it was contended, and is now contended, by the trustees of the Allen estate that the remainder to the lawfully begotten children became vested immediately upon the birth of a lawfully begotten child subject to open and let in after-born lawfully begotten children. The petitioner has now abandoned his former contention and makes the same contention as the trustees of the Allen estate. The remaining respondents have filed no brief and made no argument but submitted their case upon the brief filed for the trustees of the Allen estate. It

Opinion of the Court.

appears that all of the parties making contentions at this time are united in their belief that the former opinion of this court was erroneous. It also appears that most of the interests which would lose by a rescission of our former opinion and adopting the contention now made before us have been acquired by parties appearing and making this contention.

We pass now to a consideration of the deed in question. The instrument and the facts showing the relationship of the parties are fully set out in our former opinion and need not be repeated here. Contrary to what was heretofore held we think that at common law under this deed Elizabeth would take an estate in fee tail. In *Rooke v. Queen's Hospital*, 12 Haw. 375, 381, this court in discussing "the rule in *Wild's* case" said: "It was further resolved that in the case of a devise simply to A, and to his children or issue, without the words 'after his decease' or their equivalent, if he had children at the time of the devise, he and they would take jointly for life, that being the manifest intent and there being nothing to prevent its taking effect, but that if he did not have children at the time of the devise, he would take an estate tail, since there was a manifest intent that the children or issue should take, and as immediate devisees they could not take, because they were not in *rerum natura*, and by way of remainder they could not take, for that was not the intent, because the gift was immediate, and therefore A would take an estate tail and 'children' would be a word of limitation." With the exception of the substitution of the words "lawfully begotten children" for the words "heirs of the body" the language used in the deed under consideration is more nearly paralleled by the language used in the devise which was under consideration in *Kinney v. Oahu Sug. Co.*, 23 Haw. 747, than any other that has come before

Opinion of the Court.

this court. In that case Mrs. Bishop devised to K and K "and to the heirs of the body of either the lot of land called 'Mauna Kamala' situated at Kapalama, Honolulu; upon default of issue the same to go to my trustees upon the trusts below expressed." In this case the grant is to "Elizabeth Wond as a wedding gift and also for the better support, maintenance and livelihood of the said Elizabeth Wond, her lawfully begotten children, their heirs and assigns," with habendum "unto the said Elizabeth Wond, her lawfully begotten children, their heirs and assigns to their only proper use and behoof forever." From the above it is seen that the grant in this case is to "Elizabeth Wond, her lawfully begotten children, their heirs and assigns" without such words as "after her decease" and she had no children at the time of the execution of the deed. Accordingly under the rule in *Wild's* case and the holding in *Kinney v. Oahu Sug. Co.*, *supra*, which we will notice later, this deed would at common law have conveyed to Elizabeth Wond an estate in fee tail unless other provisions of the deed clearly show a different intent. In a subsequent clause of the deed under consideration it is provided that the land shall revert to the grantor if Elizabeth should die without leaving lawfully begotten children. This clause is quite analogous to the clause in the devise under consideration in *Kinney v. Oahu Sug. Co.*, *supra*, providing for a disposition of the property in the event there should be a default of issue. If this deed contained no further provisions than the ones we have mentioned the parallel between it and the devise construed in *Kinney v. Oahu Sug. Co.*, *supra*, would be complete, and in that case the conclusion of the court is summed up in the following language: "We take the view that where it does not appear that in the particular case a life estate and remainder would more nearly comply with the ulti-

Opinion of the Court.

mate disposition of the property and the direct benefits to be conferred thereby which the grantor and testator had in mind the attempted fee tail should take effect as a fee simple in the first taker. This, because both are estates of inheritance and belong to the same genus; both, at common law, were subject to the incidents of dower and curtesy, and were without impeachment of waste; the tenant in tail could bar the entail; an estate tail, in point of law, bears little resemblance to a life estate and remainder; and the law generally favors the first taker. In short, in such a case as this a holding that the first taker shall have an estate in fee simple will go as near as may be under the law toward effectuating the futile intent to create an estate tail."

The only clause in this deed which has no parallel in the devise under discussion in that case is the one which forbids the alienation by Elizabeth. We thus have the grantor making a conveyance under which, if all of its provisions could be given effect, Elizabeth Wond would have taken an estate in fee tail with one of its incidents, namely, the right to alienate and thus bar the entail, cut off by the clause against alienation. But, as has often been held, an estate tail cannot be created nor exist here (*Rooke v. Queen's Hospital, supra*; *Nahaolelua v. Heen*, 20 Haw. 372) and the clause against alienation is void (*Simerson v. Simerson*, 20 Haw. 57).

What course then should a court pursue when confronted with such a deed? "In some of the States in which fees tail do not exist the estate is considered a fee simple in the first taker; in others a life estate in the first taker and remainder in fee simple in the issue, while in others it is considered one or the other according to which appears to most nearly carry out the intention of the testator" (*Rooke v. Queen's Hospital, supra*). The one alternative would be to hold the attempted grant

Opinion of the Court.

void, but so far as we are aware no court has pursued that course. In attempting to give to a deed which conveys an estate that cannot exist the effect that will most nearly carry out the intention of the grantor all of the provisions of that deed, both legal and illegal, must be considered. Hence the language which would create an estate tail and the clause against alienation, although void, are not to be entirely disregarded in the attempt to give to the deed the effect most nearly approximating the grantor's intention. (*Hubbird v. Goin*, 137 Fed. 822.)

As we have already said, it was undoubtedly the intention of the grantor to grant to his daughter Elizabeth an estate in fee tail with one of the incidents of such an estate cut off by the clause against alienation. If it were not for this clause against alienation we think the case would clearly fall within the ruling in *Kinney v. Oahu Sug. Co.*, *supra*, and there could be no question as to the correctness of our former holding. We also think that since the grantor expressed clearly that he did not desire Elizabeth to have the right to sell the land—a right incident to an estate in tail—it will more nearly carry out his intention to hold that his futile attempt to convey to her an estate in fee tail with the right to bar the entail cut off resulted in conveying to her only a life estate with remainder in fee simple to her lawfully begotten children.

On the question of whether the remainder was to only such of her lawfully begotten children as survived her or was vested immediately upon the birth of a lawfully begotten child, subject to open and let in other lawfully begotten children, we think it must be held that the latter is the estate granted although much can be said in favor of the other. It is hard to tell which holding would more nearly carry out the expressed wish

Opinion of the Court.

of the grantor. Under this holding, because of the circumstances of the case, the illegitimate children of Elizabeth will be slightly benefited, a result which the grantor evidently did not desire as is evidenced by his use of the words "lawfully begotten children," but since all of the grantor's intentions as expressed in his deed cannot be carried out and since the law favors the immediate vesting of estates we resolve the doubt in favor of a remainder which vested immediately upon the birth of a lawfully begotten child subject to open and let in lawfully begotten children born thereafter.

These conclusions necessitate a modification of the decree entered in the land court as to the quantity of petitioner's interest, but in justice to the judge of the land court it should be said that he was in duty bound to follow the former decision of this court construing the deed and no error is therefore chargeable to him.

The decree is reversed and the cause remanded with instructions to the judge of the land court to enter a modified decree in accordance with the views herein expressed and the facts already before him.

E. C. Peters and *H. R. Hewitt* (*Peters & Smith* on the brief) for plaintiff in error.

I. M. Stainback (*H. Holmes* with him on the brief) for defendants in error.

Syllabus.

IN THE MATTER OF THE APPLICATION OF ELMER R. BEVINS FOR A WRIT OF MANDAMUS DIRECTED TO THE HONORABLE LESLIE L. BURR, JUDGE OF THE CIRCUIT COURT OF THE SECOND JUDICIAL CIRCUIT OF THE TERRITORY OF HAWAII.

No. 1282.

ORIGINAL.

ARGUED JULY 7, 1920.

DECIDED JULY 16, 1920.

COKE, C. J., KEMP AND EDINGS, JJ.

COURTS—*attorneys—disbarment.*

By the provisions of section 2331 R. L. 1915 circuit courts in this Territory possess the authority to dismiss attorneys from the roll of practitioners, at least so far as the roll of the court acting is concerned.

SAME—*same—same.*

The power to disbar an attorney rests upon very different grounds from the power to punish for contempt.

SAME—*same—same.*

An attorney holds his office during good behavior and can only be deprived of it for misconduct ascertained and declared by a court of competent jurisdiction after opportunity to be heard has been afforded the accused.

SAME—*same—same.*

Where the judge of the circuit court called the attention of the attorney general to certain alleged misconduct of the attorney and requested him to investigate the matter and to prefer charges against the attorney in the supreme court if in his opinion the facts warranted the judge of the circuit court was entirely without jurisdiction to prejudge of the guilt of the accused and to summarily suspend his license without a hearing.

OPINION OF THE COURT BY COKE, C. J.

The petitioner Elmer R. Bevins is an attorney at law holding a license issued by the supreme court of the Terri-

Opinion of the Court.

tory of Hawaii to practice law in all of the courts of the Territory. He is also county attorney of the County of Maui, his residence and office being at Wailuku, County of Maui. On June 18, 1920, while the term of the circuit court of the second judicial circuit was in session, Hon. Leslie L. Burr presiding as judge thereof, the petitioner appeared before the court for the purpose of moving for the arraignment of certain defendants who had theretofore been indicted by the grand jury for various criminal offenses. The judge of the court in response to the motion of petitioner refused to recognize petitioner as an attorney of said court or to permit him to appear before said court either in his private capacity as an attorney or in his public capacity as county attorney of the County of Maui until such time as the attorney general of the Territory might report upon sundry alleged derelictions on the part of the petitioner which the judge had theretofore and in open court recited and which were by him called to the attention of the attorney general with the request to the attorney general to investigate the same and to institute proceedings before the supreme court to disbar or suspend the petitioner as an attorney at law if in his opinion the facts warranted that action. The action of the circuit judge was in effect a suspension of the petitioner's right to practice law for an indefinite period of time. Within a few days thereafter the petitioner appeared in the said circuit court and presented a motion to vacate and set aside the order of suspension theretofore made by the circuit judge. The application was denied by the circuit judge and the petitioner has secured from a justice of this court an alternative writ of mandamus directed to the judge of the circuit court of the second judicial circuit to forthwith vacate his said order of suspension or to appear before the supreme court and show cause why the alternative writ of mandamus should not be made peremptory.

Opinion of the Court.

The judge of the circuit court appeared by the attorney general of the Territory and interposed a demurrer to the writ. At the argument the attorney general in open court has stipulated that should this court determine that under the law circuit courts are without authority to suspend or disbar attorneys licensed by the supreme court of the Territory to practice law in the courts of the Territory or if this court should determine that although circuit courts have that authority, under the circumstances of this case the judge of the second circuit court acted without jurisdiction or in excess of his jurisdiction in entering the order of suspension herein complained of by the petitioner, then in either case the writ heretofore issued may be made peremptory.

We are therefore confronted with two clearly defined questions which will be discussed and determined in their order. The first requires a construction of section 2331 R. L. 1915, which reads as follows: "Said practitioners shall be summarily amenable to the courts of record, and may be fined, imprisoned or dismissed from the roll of practitioners, for satisfactory cause, upon the complaint of any party aggrieved by their malpractice, or for non-payment of moneys collected by them for private parties, or for any deceit, or other gross misconduct." Circuit courts are courts of record in this Territory and by the statute above quoted it is beyond cavil that as the law now exists in this Territory circuit courts have the power to dismiss attorneys from the roll of practitioners and that of course includes the power to suspend. In this Territory the supreme court alone may grant a license to practice law such as is held by the petitioner and ordinarily the authority to disbar attorneys is reposed solely in the courts having jurisdiction to admit or license attorneys to practice, but the exception to this general rule is where by statute authority is conferred upon some other than the licensing

Opinion of the Court.

tribunal to disbar and in this jurisdiction we have such a statute.

This is the first occasion so far as we are advised where a circuit court of this Territory has attempted to suspend or disbar an attorney holding a license issued by the supreme court. In fact, we think it has been quite universally assumed that no such power was reposed in the circuit courts. The statute in question is section 1066 of the Civil Code of 1859. When that statute was originally enacted the justices of the supreme court presided over the various circuit courts throughout the islands and at that period under those circumstances it might have appealed to the lawmakers as wise legislation to make attorneys amenable to each justice of the supreme court, although for the time being the justice was presiding over a *nisi prius* court. And it further may be that in the subsequent changes in the judicial system prevailing here section 1066 of the laws of 1859 was inadvertently retained although the reason therefor had ceased to exist. But irrespective of the circumstances which have caused the retention of this unusual statute it must be given force and effect and by its plain provisions every circuit court in the Territory possesses the power and authority to dismiss attorneys from the roll of practitioners, at least so far as the roll of the court acting is concerned.

Having determined that the circuit court possesses authority and jurisdiction to dismiss attorneys from the roll of practitioners it then becomes necessary for us to decide whether the court acted in excess of its jurisdiction in entering the order herein complained of. The record before us discloses that prior to the entry of the order the judge of the circuit court from the bench verbally recited a number of misdeeds extending over a period of four years which he charged to the petitioner. These matters cover some thirty pages and are too voluminous to be here

Opinion of the Court.

repeated. It is sufficient to say that they reflect upon the character and reputation of the petitioner as an attorney at law and as county attorney of the County of Maui and have reference to matters occurring mainly outside of the presence of the court. The only action taken by the judge at the time in respect to these charges was to call them to the attention of the attorney general with the request that he examine into the same and to institute proceedings to disbar the petitioner in the supreme court of the Territory if he should find the facts sufficient to warrant that action. It does not appear that the attorney general of the Territory has taken any steps in the matter. Thereafter, when the petitioner appeared before the circuit court for the purpose of having a day set for the arraignment of certain defendants who had been indicted by the grand jury the judge of the circuit court reminded the petitioner of the recommendation which he had theretofore made to the attorney general to investigate petitioner's conduct and notified petitioner that pending the report from the attorney general he would not be permitted to appear in that court either in the capacity of a private attorney or as county attorney of the County of Maui. The order of suspension was made without affording to the petitioner any opportunity to be heard in his own behalf. Weeks on Attorneys at Law (p. 156) points out that the power to disbar an attorney proceeds upon very different grounds from the power to punish for contempt and further lays down the rule that "while there may be cases of such gross and outrageous conduct in open court as to justify very summary proceedings for the removal or the suspension of an attorney from office even then he should be heard before he is condemned." There seems to be some divergence of opinion to be found in the various decisions respecting the quality of the right enjoyed by an attorney by reason of his admission to practice law. Some courts appear to recognize it

Opinion of the Court.

as a valuable property right while others merely term it a valuable right. In *State ex rel v. McElhinney*, 241 Mo. 592, the subject is well treated and the leading authorities on the subject cited. The rule is there laid down that the right of an attorney to practice law is a valuable right which an attorney cannot be deprived of except by the judgment of a court of competent jurisdiction after a full opportunity has been accorded him to be heard in his own defense. To the same effect is *Ex parte Garland*, 71 U. S. 333, where at page 378 the court says: "They (attorneys) hold their office during good behavior, and can only be deprived of it for misconduct ascertained and declared by the judgment of the court after opportunity to be heard has been afforded." See also *Ex parte Bradley*, 74 U. S. 364; *Bradley v. Fisher*, 80 U. S. 335; *People v. Turner*, 52 Am. Dec. 295, and *Ex parte Heyfron*, 7 How. (Miss.) 127.

Where, as in the present case, the judge had called to the attention of the attorney general certain alleged misconduct on the part of the attorney and had requested him to investigate the charges and if in his opinion the facts warranted to prefer charges against the attorney in the supreme court the judge of the circuit court was entirely without jurisdiction to prejudge of the guilt of the accused and to summarily suspend his license without a hearing. An analogous case is *State v. Goode*, 4 Idaho 730, where the court said: "The order of suspension of the defendant before a trial is had is in our opinion not proper as it is in the nature of a penalty inflicted without giving the defendant his day in court and before his conviction." The office of attorney is ordinarily valuable to its possessor. Indeed it is often the source of great emolument to him. In the vast majority of cases it constitutes his only means of procuring a living not only for himself but for those depending upon him for support and to deprive him of it would

Opinion of the Court.

be likely to leave him with a blighted reputation and comparatively helpless to engage in other remunerative pursuits and thus entail upon himself and family the wretchedness of want and poverty. In view of these grave consequences it is of the highest consideration that the power to suspend or disbar be only exercised in proper cases and after a careful examination and then only after the accused has been afforded the fullest opportunity to be heard. This is not only the dictate of justice but the uniform practice carried into express adjudication in all of the cases with which we are familiar. If the alleged misconduct occurs in the presence of the court the formality of specific charges to be preferred by the aggrieved party or the attorney general may be dispensed with (see *In re Achi*, 8 Haw. 216), but in every case the accused should be permitted to explain his conduct. No judge or tribunal should be, and none is, clothed with authority to arbitrarily and without a hearing disbar or suspend an attorney theretofore duly licensed.

The alternative writ of mandamus heretofore issued herein will be made peremptory.

A. G. Smith and *H. R. Hewitt* for petitioner.

H. Irwin, Attorney General, for respondent.

Syllabus.

JOHN KAHAKA KAHEPU v. CHARLES E. KING.

No. 1168.

ERROR TO CIRCUIT JUDGE FOURTH CIRCUIT.

HON. C. K. QUINN, JUDGE.

ARGUED JULY 20, 1920.

DECIDED JULY 22, 1920.

COKE, C. J., KEMP AND EDINGS, JJ.

APPEAL AND ERROR—*assignment of errors—sufficiency.*

An assignment of error general in its nature and indefinite is not sufficient and will not be considered.

OPINION OF THE COURT BY KEMP, J.

This is a writ of error sued out by the plaintiff to review a decree entered in the above entitled cause, the assignments of error, omitting the unnecessary verbiage, being as follows: "(1) That the master of accounts committed prejudicial error to the plaintiff herein named in the computation and summary of accounts existing between the said plaintiff; (2) that said master aforesaid erred in his findings as such master of accounts recommending that plaintiff pay over unto said defendant the sum of \$3042.68, said master's findings and recommendations * * * being adverse to the testimony and evidence adduced at the hearing before said master; (3) that in awarding said sum of \$3042.68 * * * the said master committed error in that he did omit very important findings and recommendations, to wit, concerning the mortgages now and at that time appearing in record as being uncanceled and filed at the hearing had before said master between the plaintiff herein and the said defendant, all of which was and is grievous and prejudicial errors against the said plaintiff; (4) that said circuit court of the fourth

Opinion of the Court.

judicial circuit erred in its findings by its decision, the findings set forth in said decision being contrary to the evidence thereto adduced or predicated; (5) that the decree sought to be set aside and reversed does not comply with the prayer of the relief prayed for by plaintiff or the defendant herein named and is therefore erroneous and contrary to the evidence adduced in said cause."

It is well settled by the decisions of this court that an assignment of error general in its nature and indefinite is not sufficient and will not be considered. *Pahukula v. Maguire*, 9 Haw. 630.

We are of the opinion that none of the assignments of error except the fifth is sufficiently definite to enable us to consider it. The fifth assignment of error raises the single question of whether or not the decree was authorized by the prayer of the plaintiff or defendant. After the filing of plaintiff's bill, which was a bill for an accounting in which the plaintiff prayed "that pending a hearing had herein an account may be taken of all sums of money received by or come to the hands of the said defendant as such agent of the plaintiff," the defendant filed his answer and cross-bill in which he also prayed "that the court order a full and complete accounting between plaintiff, the respondent and the Hilo Building and Loan Association, Limited; that the plaintiff may be ordered to pay to the respondent and the Hilo Building and Loan Association, Limited, the amounts of money which shall be found to be due and owing from the plaintiff to the respondent and the Hilo Building and Loan Association, Limited." The court thereupon appointed a master at the request of both parties "for the purpose of hearing the above entitled cause and submitting his findings to this court." After a lengthy hearing in which all of the business transactions between the plaintiff and defendant were fully inquired into the master stated an account between them showing that the

Syllabus.

plaintiff is indebted to the defendant in the sum of \$3042.32 and recommended among other things that a decree be entered allowing this amount, being the balance after disallowing many items claimed by the defendant to be owing to him from plaintiff. No account was stated between the plaintiff and the Hilo Building and Loan Association, Limited, and no decree entered requiring the plaintiff to account to said association.

Under this state of facts we are unable to sustain the contention of the plaintiff in error that the decree is not supported by the prayer for relief.

The decree is affirmed.

J. S. Ferry for plaintiff in error.

W. H. Beers and *N. W. Aluli* filed a brief for defendant in error.

MRS. ELLA RHOADES *v.* J. V. MACIEL.

No. 1253.

MOTION TO QUASH WRIT OF ERROR.

ARGUED JULY 20, 1920.

DECIDED JULY 22, 1920.

COKE, C. J., KEMP AND EDINGS, JJ.

JUDGMENT—*modification of after expiration of term.*

The jurisdiction of a court over its judgments terminates with the close of the term at which they were rendered and they cannot be set aside or altered after the expiration of the term at which they were entered unless the proceeding for that purpose was begun during the term.

OPINION OF THE COURT BY COKE, C. J.

This cause is now before us on a motion of the plaintiff-defendant in error to quash the writ of error hereto-

Opinion of the Court.

fore sued out by the defendant-plaintiff in error. The ground upon which the motion is based is that the writ of error was not issued or applied for within six months from the date of the entry of the judgment herein. It appears from the record before us that this cause was tried at the October 1918 term of the circuit court of the second judicial circuit by the judge of that court without a jury; that at the conclusion of the hearing and within said term of court the judge thereof rendered his decision finding for the plaintiff-defendant in error and upon the same date judgment based upon the decision was duly entered by the clerk of the court. Thereafter, to wit, on the 2d day of January, 1919, and long after the October 1918 term of the circuit court had expired counsel for the defendant-plaintiff in error appeared before the court and submitted a form of decision to be entered in the above cause; that on the 4th day of January, 1919, the court rendered a second decision in the cause and on the 3d day of July, 1919, a second judgment was entered up by the clerk of the court. The writ of error sued out herein is dated the 3d day of January, 1920.

The entire proceedings had subsequently to the October 1918 term were null and void. "It was one of the earliest doctrines of the common law that the record of a court might be changed or amended at any time during the term of the court in which a judgment was rendered, and now as then the general power of a court of record over its own judgments, orders and decrees during the existence of the term at which they are first made is undeniable. But it is also a rule of the common law that the jurisdiction of a court over its decrees terminates with the close of the term at which they were rendered, and a judgment may be amended or corrected only at the term during which it was entered and not thereafter" (15 R. C. L. 677). There are certain well defined excep-

Syllabus.

tions to the foregoing rule pointed out in *Baker v. Brown*, 18 Haw. 22; *Holiona v. Kamai*, 24 Haw. 638; *United States v. Mayer*, 235 U. S. 55, at p. 67. See also 15 R. C. L. 678. But in the light of the record before us the present case does not fall within any of the recognized exceptions to the rule, and by all of the authorities the proceedings of the court had herein subsequently to the expiration of the October term of the court were abortive and void and it follows that the only subsisting judgment in the court below was that bearing date the 25th day of November, 1918.

The writ of error herein was not had within six months from the rendition of the judgment and the motion of the plaintiff-defendant in error to quash the writ of error must be granted and it is so ordered.

E. R. Bevins for the motion.

E. Murphy contra.

TERRITORY v. NEVENCIO GAMAYA.

No. 1274.

ERROR TO CIRCUIT COURT SECOND CIRCUIT.

HON. L. L. BURR, JUDGE.

SUBMITTED JULY 20, 1920.

DECIDED JULY 22, 1920.

COKE, C. J., KEMP AND EDINGS, JJ.

CRIMINAL LAW—*former jeopardy*.

Where the jury found the accused not guilty of the offense charged but of a lower one which is included in it and upon an appeal from that judgment by the accused a reversal is had in the appellate court the accused can again be tried for the greater offense set forth in the indictment.

Opinion of the Court.

SAME—*same*.

Neither the court nor the jury is limited upon a new trial to a consideration of the question of the guilt of the lower offense of which the accused was convicted on the first trial, but the reversal of the judgment of conviction opens up the whole controversy and acts upon the original judgment as if it had never been.

SAME—*same*.

The accused by his own action has obtained a reversal of the whole judgment and upon a new trial he may be proceeded against as if no trial had previously taken place.

OPINION OF THE COURT BY COKE, C. J.

This cause comes here from the circuit court of the second judicial circuit on a writ of error. The cause was formerly before us on a writ of *habeas corpus*. (See *In re Gamaya*, ante p. 414, where the facts in detail are to be found.) It was held by us that in order to sustain the conviction of the defendant for an indecent assault the female child upon whom the assault was alleged to have been committed must have been at the time of the assault under the age of twelve years. The record now before us discloses that the female was over the age of twelve years, to wit, the age of nineteen years, and the prosecuting officer has filed herein a confession of error in which he consents to the verdict and judgment based thereon being set aside and asks that a new trial be ordered. The attorney for defendant-plaintiff in error insists, however, that in view of the fact that the defendant was by the jury found not guilty of the crime of rape and the further fact that this court must hold that he cannot be convicted of the lesser crime he should be ordered discharged because of his former jeopardy.

The question thus presented is whether upon an indictment for a greater offense, the jury having found the accused not guilty of the offense charged but of a lower one which is included in it, and upon an appeal from that judgment by the accused a reversal is had in the

Opinion of the Court.

appellate court, the accused can be again tried for the greater offense set forth in the indictment or must the trial be confined to the offense of which the accused has previously been convicted and which conviction upon his own motion has been set aside and reversed by the higher court.

This question has given rise to much diversity of opinion in the various state courts. The Supreme Court of the United States in *Trono v. United States*, 199 U. S. 521, after discussing both views of the question, disposes of it in the following language: "In our opinion the better doctrine is that which does not limit the court or jury upon a new trial to a consideration of the question of guilt of the lower offense of which the accused was convicted on the first trial, but that the reversal of the judgment of conviction opens up the whole controversy and acts upon the original judgment as if it had never been. The accused by his own action has obtained a reversal of the whole judgment, and we see no reason why he should not upon a new trial be proceeded against as if no trial had previously taken place. We do not agree to the view that the accused has the right to limit his waiver as to jeopardy when he appeals from a judgment against him. As the judgment stands before he appeals it is a complete bar to any further prosecution for the offense set forth in the indictment or of any lesser degree thereof. No power can wrest from him the right to so use that judgment, but if he chooses to appeal from it and to ask for its reversal he thereby waives, if successful, his right to avail himself of the former acquittal of the greater offense contained in the judgment which he himself procured to be reversed."

It is true there is a strong dissent voiced by Mr. Justice McKenna and concurred in by the Chief Justice and Mr. Justice White from the majority opinion in the

Syllabus.

Trono case. If we were at liberty to adopt either of the divergent views expressed in the *Trono* case we might follow the doctrine announced in the dissenting opinion, but we have no such choice and are bound by the opinion of the Federal Supreme Court which requires us to merely set aside the verdict of conviction and the judgment entered thereon and to remand the cause to the lower court for a new trial, and it is so ordered.

E. R. Bevins, County Attorney of Maui, for the Territory.

E. Murphy for defendant.

TERRITORY *v.* JOHN PUANA.

No. 1254.

APPEAL FROM DISTRICT MAGISTRATE OF MAKAWAO.

SUBMITTED JULY 20, 1920.

DECIDED JULY 22, 1920.

COKE, C. J., KEMP AND EDINGS, JJ.

INDICTMENT AND INFORMATION—*requisites of.*

A complaint which alleges that the defendant did unlawfully and furiously and heedless of the safety of others drive an automobile and did thereby imminently endanger the personal safety of others (without naming the person or persons whose personal safety was imminently endangered) although substantially in the language of the statute (Sec. 4100 R. L. 1915) is insufficient.

OPINION OF THE COURT BY KEMP, J.

The defendant was tried and convicted in the district court of Makawao, County of Maui, under a complaint which charged "That John Puana at Paliuli, district of Makawao, County of Maui, Territory of Hawaii, on to wit the 25th day of December, A. D. 1919, did unlawfully, and furiously and heedless of the safety of others drive a vehicle, to wit, an automobile and did thereby immi-

Opinion of the Court.

nently endanger the personal safety of others, contrary to the form, force and effect of the statutes in such cases made and provided and particularly Chapter 252 of the Revised Laws of Hawaii 1915 as amended by Act 50 of the Session Laws of 1915 and further amended by Act 150 of the Session Laws of 1917." At the hearing the defendant demurred to the charge on the ground that it is indefinite and does not show sufficient facts to constitute a violation of any criminal law of the Territory of Hawaii. The demurrer was overruled, the defendant entered a plea of not guilty, and after a trial was convicted and sentenced to pay a fine of \$25, from which judgment defendant has appealed to this court on points of law as follows: (1) That the district court erred in overruling defendant's demurrer to the charge entered against him; (2) that the sentence of the court is void and contrary to law in that the court has no jurisdiction in said cause.

Under the first point of law it is the contention of the defendant that the charge is fatally defective for the reasons (1) that it fails to set forth that defendant drove said automobile on a public highway; (2) that it fails to allege that the person endangered by said driving of defendant was on a public highway and (3) that said charge fails to disclose the name of the injured person who was imminently endangered by said driving of defendant. The section of the statute under which the complaint is drawn (Sec. 4100) is as follows: "Whoever furiously or heedlessly of the safety of others * * * drives or conducts any * * * automobile * * * and thereby imminently endangers the personal safety of any person shall be punished" etc.

We will consider first the question of whether or not it was necessary for the complaint to allege the name of the person whose personal safety was imminently endan-

Opinion of the Court.

gered. In *Carter v. State*, 12 Ga. Ap. 430 (78 S. E. 205), the defendant was convicted of a violation of the statute regulating the operation of automobiles on the public highways of the State. There were three counts in the accusation, the first charging that he operated an automobile "at a rate of speed greater than was reasonable and proper," the second that he operated an automobile "so as to endanger the life and limb of persons and the safety of property," and the third that he operated an automobile on a public highway at a place known as Herndon's corner without having said machine under control and operated it at a speed greater than six miles per hour. The defendant demurred to the complaint, his ground of demurrer to the second count being that the accusation failed to show what person or what property was injured by the running of the automobile named in the accusation. The demurrer was overruled and the defendant appealed. In the discussion of the question raised by the demurrer to the second count the court used the following language: "We think also that the demurrer to the second count under the accusation should have been sustained. While as a general rule the accusation which defines an offense in the precise language of the statute is sufficient * * * still this is not a universal rule and as has been frequently pointed out in the decisions and text books * * * there are some offenses of such a nature as that a charge in the language of the statute under which the accusation is brought would be wholly insufficient to so inform the accused of the nature of the charge against him as to enable him to prepare his defense. Every person accused of crime has the right to be sufficiently informed as to the time, place and circumstances of an alleged offense to identify it and enable him to prepare his defense. Presumptively at least one accused of crime is innocent and if he is indeed innocent

Opinion of the Court.

and yet the particular crime with which he is charged (identified only by its code definition) is merely alleged to have been committed by him at a time within the statute of limitations and in the county in which the accusation is preferred he is no better informed as to the identity of the alleged criminal transaction as to which he is called upon to defend than were the Romans as to the provisions of the statutes which Caligula required them to obey though he purposely placed his edicts upon a column too high to be seen."

In *Territory v. Pupuhi*, 24 Haw. 565, where the defendant was charged in the language of the statute with the crime of gross cheat it was held that the indictment was insufficient for the reason that it did not set forth the false pretenses intended to be relied upon. The statute involved in that case is a very different statute from the one under consideration here yet we think the reasoning in that case is applicable to this. If the owner of an automobile was accustomed to use his machine even a small portion of the time and it was charged that in the county on some day within the statute of limitations and at some place, of which the accusation gives no hint, he operated his automobile so as to immediately endanger the personal safety of some person or persons whose names were not even suggested he might be placed absolutely at the mercy of the prosecution though the testimony against him be false. He would also be unable to successfully plead former jeopardy if again accused in the same language of the same offense. We therefore hold that the failure to allege the name of the person whose personal safety was imminently endangered by said driving renders the complaint insufficient.

The other contention of the defendant to the effect that the complaint should allege that the defendant was driving said automobile on a public highway presents a very close

Syllabus.

question and in view of the fact that the case will have to be sent back to the district court where a new complaint will have to be drawn if the defendant is to be again placed upon trial we do not decide the question therein presented. If the facts warrant it the county attorney in drawing a new complaint can avoid the question, and from the facts developed upon the first trial it appears that the driving was upon a public highway.

For the error pointed out the judgment is reversed and the cause remanded for further proceedings consistent with the views herein expressed.

E. R. Bevins, County Attorney of Maui, and *Wendell F. Crockett*, Deputy County Attorney of Maui, for the Territory.

E. Vincent for defendant.

MARY K. WILLIAMS, CARRIE KAPIHE, HENRY WILLIAMS, DAVID K. WILLIAMS, JAMES K. WILLIAMS AND SOLOMON WILLIAMS v. RIGHT REVEREND LIBERT HUBERT BOEY-NAEMS, BISHOP OF ZEUGMA, VICAR APOSTOLIC OF HAWAII, AS TRUSTEE.

No. 1267.

APPEAL FROM CIRCUIT JUDGE FIRST CIRCUIT.

HON. J. J. BANKS, JUDGE.

SUBMITTED JULY 27, 1920.

DECIDED JULY 31, 1920.

COKE, C. J., EDINGS, J., AND CIRCUIT JUDGE DEBOLT
IN PLACE OF KEMP, J., ABSENT.

EQUITY—*rescission of executed contract of sale.*

Where a contract for the sale of land has been executed by an act of conveyance a court of equity will not rescind the contract on

Opinion of the Court.

account of the mere defect of title except in case of fraud or some other recognized equitable ground but will leave the party to his remedy upon the covenant in his deed.

SAME—same.

In order to constitute a ground for a rescission of the contract because of fraudulent misrepresentations the misrepresentations must be of fact and not of law for a misrepresentation or mistake of law will not vitiate a contract where there is no misrepresentation of the facts.

OPINION OF THE COURT BY COKE, C. J.

This is a suit in equity for the rescission and cancellation of two certain deeds. The history of the transaction sought to be annulled is as follows so far as it is necessary to now refer to it. On and prior to April 17, 1886, Carrie Kaaukai was the owner of a certain tract of land situated at Kamakela, Honolulu, Oahu, described in R. P. 1969, L. C. A. 863; that at the same time the Rt. Rev. Dr. Herman Kockemann, Bishop of Olba, Vicar Apostolic of the Hawaiian Islands, as trustee for the Catholic Church of the Hawaiian Islands, was the owner of a certain tract of land situated at Kamakela, Honolulu, Oahu, the same being apana 3 of R. P. 1985, L. C. A. 6245; that upon the said 17th day of April, 1886, each of said parties transferred to the other his or her lot by separate deeds for the consideration expressed in each deed of \$1000. Each of the deeds purports to convey a fee simple title to the grantee and each contains full covenants of warranty. The complainants herein are the successors in interest of the said Carrie Kaaukai and the respondent herein is the successor in interest of the said Bishop Kockemann.

It is alleged in the bill of complaint that prior to the 17th day of April, 1886, it was mutually covenanted, understood and agreed between the parties to exchange their lands and that the deeds executed and delivered by

Opinion of the Court.

one to the other were for the purpose of effectuating that agreement. The expressed consideration of \$1000 mentioned in the deeds was not the true consideration therefor. It is further alleged that as a part of the contract and agreement of exchange it was at all times agreed, understood, covenanted and represented by one party to the other that each of the parties was possessed of an estate in fee simple of the respective pieces of real estate so conveyed each to the other and that each had a good right, title and authority to sell and dispose of the same and that each would warrant and defend the title in his grantee his heirs, successors and assigns, etc. It appears from the record that upon the delivery of these deeds each of the grantors went into possession of the newly acquired premises. In the year 1912 the complainants or their predecessor became aware that one L. Ah Leong claimed to be the owner of one-half of the land conveyed by the deed from the Rt. Rev. Dr. Kockemann to Kaaukai and an action was thereupon instituted in the circuit court of the first judicial circuit against Ah Leong on behalf of the complainants to quiet the title to all of said property. At the conclusion of the trial of this cause judgment was entered in favor of Ah Leong for an undivided one-half interest in the land. This judgment was on appeal subsequently affirmed by the supreme court of Hawaii (see 21 Haw. 699) and again affirmed by the Supreme Court of the United States (see 242 U. S. 612).

The purpose of this suit is to have a rescission of the transaction because of the mistake above set forth which the complainants claim operates as a legal fraud upon them. There is no allegation in the bill of complaint of actual fraud or of any intentional misrepresentation against the respondent or his predecessor. In fact the allegations in the bill expressly negative any such impli-

Opinion of the Court.

cation. The entire burden of complainants' grievance is that because after the original transfers between the parties it developed that the legal title to part of the land which was transferred to the complainants was in a third party they now have a right to a decree of a court of equity rescinding both transfers and placing the parties in *statu quo ante*.

The respondent interposed a demurrer to the bill of complaint which was sustained by the court below on the ground that the complainants have a full, adequate and complete remedy at law. From this decision complainants have appealed to this court and now urge (1) that the circuit court erred in sustaining the demurrer upon the above ground for the reason that the contract was made under a mutual mistake of a material fact; (2) where there is no actual fraud but a mutual mistake is shown it is equivalent to fraud in law, and (3) where there has been a breach of covenants by one party in the agreement to exchange property the other party may rescind the exchange.

The rule we think is that where a contract for the sale of land has been executed by an act of conveyance a court of equity will not rescind the contract on account of the mere defect of title except in a case of fraud or some other recognized equitable ground but will leave the party to his remedy upon the covenants in his deed. (*Woodruff v. Bunce*, 9 Paige 442, 443; *Hart v. R. R.*, 65 Mo. 509; *Beebe v. Swartwout*, 8 Ill. 162, 185.) And in order to constitute a ground for a rescission of the contract because of fraudulent misrepresentations the misrepresentations must be of fact and not of law for a misrepresentation or mistake of law will not vitiate a contract where there is no misrepresentation of the facts. (See 10 Ency. U. S. Rep. 804; 1 Story Ch. 129, 25, 26; 20 Cyc. 19, 54; *Burt v. Bowles*, 69 Ind. 1; *Ward v. Luneen*, 25 Ill. App. 160.)

Opinion of the Court.

It cannot be doubted that there was a mutual mistake in reference to the title or ownership of a part of the land transferred to Mrs. Kaaukai but that the mistake was entirely one of law and not of fact is clearly shown by the records and the opinions of this court in *Bocynaems v. Ah Leong*, 21 Haw. 699, and *Nahaolelua v. Heen*, 20 Haw. 372; 613. These cases turn entirely on questions of law, no facts whatever being involved.

Long prior to the institution of this suit the transaction was completely executed. There is no allegation that the respondent is insolvent nor is there any allegation of actual fraud or of a mutual mistake of any material fact or any misrepresentation in respect thereto amounting to fraud, and of course this cause cannot be maintained upon the theory that it was instituted to prevent a multiplicity of suits. In other words, there is nothing in the complaint which places the cause upon any of the known grounds calling for equitable interference. It seems plain to us that this is a case where the complainants have a plain, adequate and complete remedy at law for breach of the covenant of warranty contained in the deed from Bishop Kockemann to Carrie Kaaukai.

The decree below sustaining the demurrer of respondent is affirmed.

Andrews, Pittman & O'Brien for complainants.

Perry & Matthewman for respondent.

Syllabus.

HOOMANA NAAUAO O HAWAII, A CORPORATION,
BY J. E. K. MAIA, A. L. NAKEA, D. K. DIAMOND,
A. I. BRIGHT, ROBERT AKANA, J. A. HOOKAMA,
RICHARD WEEDON, C. L. KEALOHA, F. A. KAKALIA,
M. K. KANEIAKALA AND ISAIA POAI v. W. S. J. O. MAKEKAU,
J. ISERAELA, L. R. KEKUEWA, MRS. KAHALEWEHI BAKER,
G. NICHOLAS, H. PELE, SAMUEL KEANU, ALEX. GEORGE
AND W. E. EDMUNDS.

No. 1285.

APPEAL FROM CIRCUIT JUDGE FIRST CIRCUIT.

HON. C. S. FRANKLIN, JUDGE.

ARGUED JULY 29, 30, 1920.

DECIDED AUGUST 31, 1920.

COKE, C. J., EDINGS, J., AND CIRCUIT JUDGE DEBOLT
IN PLACE OF KEMP, J., ABSENT.

TRIAL—*status of case remanded generally to a circuit judge at chambers.*

Upon a general remand to a circuit judge at chambers all issues of law and fact except such issues of law as were determined by the appellate court are again before the lower court for trial and determination.

SAME—*same.*

The cause is thus opened for the introduction by either side of any and all competent evidence which is pertinent to any of the issues raised by the pleadings. If the same judge who presided in the former trial also presides at the second trial the evidence received at the former trial would ordinarily still be in the mind of the judge or the transcript thereof available to him and it would therefore be unnecessary to have the evidence introduced at the second trial.

SAME—*same.*

Should the trial judge at the second hearing deem it necessary or proper to have the evidence taken at the former hearing again adduced it should again be placed in the record.

SAME—*same.*

But both parties should be permitted to introduce any other or further evidence touching any of the issues which they may elect to present.

OPINION OF THE COURT BY COKE, C. J.

This quo warranto proceeding was previously before us (see *Hoomana Naauao v. Makekau*, ante p. 418), at which time, and upon the record then before us, we held that the convention called by the president on June 20, 1919, a notice of which was duly published, to take place on July 21 of that year, constituted the legal call for a convention of the members of the society. The judgment appealed from was reversed and the cause was remanded generally to the court below without instructions. After the cause reached the lower court on the remand from this court the petitioners moved for a judgment in their favor upon the record. The respondents filed written objections to the motion and gave notice of their desire to adduce additional testimony upon two points, that is to say, first, to show that the notice given by publication by the president of the corporation was insufficient in that it did not comply with the custom of the corporation in the calling of annual conventions, and second, that even if the convention called by the president for the 21st of July, 1919, was legally called upon proper notice a legal quorum for the transaction of business was not present at the convention of that date. The trial judge ruled that he would admit testimony under the first point but not under the second. Some evidence, however, was introduced bearing upon the second question, but it appears that this evidence was ignored by the judge. At the conclusion of the hearing a judgment was entered favorably to the petitioners. From this judgment the respondents have brought the cause here on appeal.

The principal question to be determined is what should be the status of a proceeding pending before a circuit judge at chambers where the judgment of that court has been reversed by the supreme court on appeal and the cause remanded generally.

The petitioners, appellees herein, appear to assume

Opinion of the Court.

that the power of the court below is limited to merely entering a decree in accordance with the decision of the appellate court based upon the facts established at the prior trial. The respondents-appellants urge that as the case was remanded without directions the whole case is reopened so far as the facts are concerned, and is also reopened as to the law involved except as to such points as were decided on the appeal, while the circuit judge appears to have taken a middle ground adopting the view that it was discretionary with him to designate the issues respecting which evidence would be heard. In this we think he was in error.

Upon a general remand of a case to a circuit judge at chambers all issues of law and fact except such issues of law as were determined by the appellate court are again before the lower court for trial and determination. The case is thus opened for the introduction by either side of any and all competent evidence which is pertinent to any of the issues raised by the pleadings. Of course if the same judge who presided in the former trial also presides at the second trial the evidence received at the former trial would ordinarily still be in the mind of the judge or the transcript thereof available to him and it would therefore be unnecessary to have that evidence reintroduced at the second hearing. However, should the trial judge at the second hearing deem it necessary or proper to have the evidence taken at the former hearing again adduced it should again be placed in the record. But both parties should be permitted to introduce any other or further material and competent evidence touching any of the issues which they might elect to present. The subject under consideration in its present form has not heretofore been before this court but some of the authorities which indicate the rule which we have adopted are as follows: *Bierce v. Waterhouse*, 19 Haw. 594, 598; *Wall v. Focke*, 22 Haw.

Opinion of the Court.

221, 223; *Glassell v. Hansen*, 149 Cal. 511, 514; *Haffner v. R. Co.*, 96 Va. 528, 529; *Burnham v. R. Co.*, 87 Neb. 696; *Barrett-Hicks Co. v. Glas*, 14 Cal. App. 289, 295; *Rodisch v. Moore*, 257 Ill. 615.

Counsel for petitioners-appellees draw attention to the recognized rule that an appellant must specify all of the errors upon which he relies for a reversal of the judgment from which he appeals and that he cannot upon his second appeal be heard to say that there were other errors which he did not specify in his prior appeal. The only exception to this rule is where upon the second appeal there is evidence of a different character in the record. In the present case there has been some additional evidence introduced since the case was here on the former appeal. And aside from that consideration it must be borne in mind that the former appeal was prosecuted by the petitioners, now the appellees, and that this is the first appeal of the present appellants. As was said in *Bierce v. Waterhouse* (19 Haw. 598), now for the first time the judgment of the circuit court stands against the respondents. Hence the rule relied on by the appellees has no application here.

Counsel for respondents-appellants now urge that because of the state of the present record this court should hold that in the giving of the notice of the convention of July 21, 1919, the established custom was not followed and that it should be further held that a legal quorum, as required by the by-laws of the society, was not present at said convention. To this we are unwilling to accede.

The circuit judge at the second hearing unduly curtailed the issues and improperly limited the scope of the evidence proposed to be introduced. It would therefore, in view of the state of the present record, be improper for this court to determine these issues.

We think that the judgment appealed from should be reversed and the cause remanded to the court below for

Syllabus.

further proceedings consistent with this and our former opinion herein, and it is so ordered.

C. F. Clemons (*Watson & Clemons* on the brief) for petitioners.

A. G. M. Robertson (*Robertson, Castle & Olson* on the brief) for respondents.

HOOMANA NAAUAO O HAWAII, AN HAWAIIAN CORPORATION, BY J. E. K. MAIA, A. L. NAKEA, D. K. DIAMOND, A. I. BRIGHT, ROBERT AKA-NA, J. A. HOOKAMA, F. A. KAKALIA, M. K. KANEIAKALA AND ISAIA POAI, PLAINTIFFS, v. W. S. J. O. MAKEKAU, J. ISERAELA, L. R. KEKUEWA, MRS. KAHALEWEHI BAKER, G. NICHOLAS, H. PELE, SAMUEL KEANU, ALEX. GEORGE AND W. E. EDMUNDS, DEFENDANTS; STANLEY STEPHENSON, PACIFIC ENGINEERING CO., LTD., AN HAWAIIAN CORPORATION, JAMES BICKNELL, AS AUDITOR OF THE CITY AND COUNTY OF HONOLULU, J. F. BOWLER AND C. INGVORSEN, COPARTNERS AS BOWLER & INGVORSEN, GARNISHEES.

No. 1287.

APPEAL FROM DISTRICT MAGISTRATE OF HONOLULU.

SUBMITTED SEPTEMBER 2, 1920.

DECIDED SEPTEMBER 14, 1920.

COKE, C. J., EDINGS, J., AND CIRCUIT JUDGE DEBOLT IN PLACE OF KEMP, J., ABSENT.

PROCESS—*copy to be served on defendant.*

The copy of process served on the defendant need not be an exact counterpart of the original. Clerical errors will not affect the jurisdiction of the court when the defendant has not been misled thereby.

Opinion of the Court.

SAME—same.

But where the statute requires that the original must bear the signature of the magistrate or his clerk and the purported copy is entirely unsigned it is fatally defective.

SAME—same.

It is the copy of the summons alone that brings the party into court and he is justified in assuming that it is in all respects like the original.

APPEARANCE—effect of special appearance.

A defendant may appear specially and move to quash the service without submitting himself to the jurisdiction of the court other than for the purpose of prosecuting his motion.

COURTS—alias summons.

District courts are created by statute and are of limited jurisdiction. They possess no authority to issue an alias summons after the return day of the original has expired.

OPINION OF THE COURT BY COKE, C. J.

This cause was instituted in the district court of Honolulu by the plaintiffs against the defendants and the garnishees. The copies of summons served on the defendants Nicholas and George were defective in that they did not contain the day of the month upon which the summons was issued nor the name of the magistrate or his clerk. The concluding paragraph of these copies reads as follows: "Given under my hand this day of May, 1920. Clerk District

Court of Honolulu, City and County of Honolulu, Territory of Hawaii," while the original reads: "Given under my hand this 29th day of May, 1920. D. K. Kaeo, Clerk District Court of Honolulu, City and County of Honolulu, Territory of Hawaii." On the return day the defendants Nicholas and George appeared specially by their counsel in the district magistrate's court and subsequently, to wit, on the 16th day of June, 1920, under their special appearance aforesaid, they interposed a motion to quash the service of the summons upon them be-

Opinion of the Court.

cause of the defects in the copies of the summons above mentioned. The plaintiffs thereupon filed a motion addressed to the court for an order amending the defective copies of the summons to correspond with the original thereof, and plaintiffs further moved, in case of the denial of their motion to amend, for the issuance of an alias summons to be served on said two defendants. These motions were disallowed by the magistrate and the motion to quash was thereupon granted and the complaint and cause dismissed as to the said two defendants. From the judgment of dismissal the plaintiffs have perfected an appeal to this court upon the two points of law above designated. The facts as herein outlined are not in dispute.

Under our statute all original writs issued out of the district court shall be returned not less than one nor more than six days from the date of the issuance. It will be noted that the motion to amend or to allow the alias summons was not presented until some days after the expiration of the return day. Section 2337 R. L. 1915, as amended by Act 105 S. L. 1915, requires that the summons shall be signed by the magistrate of the court or by the duly appointed clerk of such court. The purpose of the service of the copy of the summons is of course to notify the defendant of the proceedings and of the time and place at which he is required to appear, as well as the nature of the claim against him, and the name of the court before which the proceedings are pending. If he is not served with a copy of the process the court acquires no jurisdiction over him and no valid judgment can be rendered against him. The copy served on the defendant need not be an exact counterpart of the original summons. Clerical errors will not affect the jurisdiction of the court where defendant has not been misled thereby. All that is required is that the copy should be substantially correct. But where the

Opinion of the Court.

statute requires that the original must bear the signature of the magistrate or his clerk and the purported copy is entirely unsigned it is fatally defective. A case illustrating this is *Jones v. Marshall*, 43 Pac. 840. See also *Stayton v. Newcomer*, 44 Am. Dec. 524. It is the copy of the summons alone that brings the party into court, and he is justified in assuming that it is in all respects like the original. Clearly under our statute where the copy of the summons served bears no signature it cannot be held to be a proper notification to the defendant and he might safely ignore it, or, perhaps, with more propriety, as the defendants herein did, appear specially and move to quash the service for generally speaking the law is more strict where the question is raised at the outset, than where it is not raised until after judgment. To emphasize let us assume that the original was not authenticated by the signature of the magistrate or his clerk. In that case could a valid judgment of default be rendered against the defendants? We think not. The same question was before the supreme court of the State of Iowa in *Hoitt v. Skinner*, 99 Ia. 360. The statute of that State provides that "actions in courts of record shall be commenced by serving defendant with a notice signed by the plaintiff or his attorney" just as our statute provides that in district courts process shall be signed by the magistrate or his clerk. In the Iowa case the copy of the process served upon the defendants did not contain the signature of either the plaintiff or his attorney. The Iowa court deals with the question in the following language: "It seems clear to us that, unless the copies show that the original was authenticated by the signature of the plaintiff or his attorneys, the defendants were not bound to recognize it as a legal notice. They knew the notice only as shown by the copy and surely had the original been, as these copies represented it to be, without signa-

Opinion of the Court.

ture, the court would have refused a default and judgment. * * * Our conclusion is that because of the omission to show in the copy served that the original was signed by the plaintiff's attorneys it is as though no notice had been served and the court was therefore without jurisdiction", etc. See also *Steedle v. Woolston*, 88 N. J. L. 91; *Wong Kee v. Lillis*, 138 Pac. 900; *Lindsay v. Board of Commissioners*, 56 Kans. 630. Counsel for appellants cite *Hackfeld v. Coerper*, 18 Haw. 587, as authority supporting their contention that the district magistrate should have allowed their motion to amend even though the defendants appeared specially. In the *Hackfeld-Coerper* case there was a motion to quash the summons on the ground that the copy served upon the defendant did not contain the copy of the signature of the magistrate and this court held that the motion should have been granted. But defendant in that case had appeared generally and this of course conferred jurisdiction over him. It is true in the opinion the court stepped aside from the issues involved and from the record to remark that the motion should have been granted even had the defendant appeared specially. This statement of the court is clearly dicta and while we are familiar with the rule that dictum of a court is always entitled to respect and often to great weight, yet we are compelled to hold that the dicta in the *Hackfeld-Coerper* case gave voice to an unsound principle of law. If by reason of the service of a defective process on a defendant the court does not acquire jurisdiction over the person of the defendant the great weight of authority is that the defendant may appear specially and move to quash the service without submitting himself to the jurisdiction of the court other than for the purpose of prosecuting his motion. "Irregularity in a proceeding by which jurisdiction is to be obtained is in no case waived by the special appearance of the defendant for the purpose of calling the attention of the court to

Opinion of the Court.

such irregularity." *Goldey v. Morning News*, 156 U. S. 518; *Harkness v. Hyde*, 98 U. S. 476; *Southern Pacific v. Denton* 146 U. S. 202; *Mexican Cent. Ry. v. Pinkney*, 149 U. S. 194. "A general or voluntary appearance is equivalent to service of process and confers jurisdiction of the person on the court." But "where the appearance is made for the purpose of objecting to the jurisdiction * * * for defects in the service * * * such special appearance does not, as a rule, give the court jurisdiction of the person." (3 Cyc. 515, 527.) Of course by the general appearance of the defendant in the *Hackfeld-Coerper* case, *supra*, complete jurisdiction was acquired by the court and the amendment was perhaps proper. But had the defendant appeared specially, as the defendants in this case have done, we cannot agree with the doctrine that his status would have been the same.

The second point relied upon by appellants questions the correctness of the magistrate's refusal to issue an alias summons to be served upon the defendants Nicholas and George. District courts are created by statute and are of limited jurisdiction. They possess no authority to issue an alias summons after the return day of the original has expired.

We are mindful of the modern tendency to temper early day strict rules appertaining to pleading and practice, especially in courts not of record, but we are unwilling to endorse any lax or careless procedure affecting the present rule requiring that every defendant against whom suit is instituted must be served with proper and legal process, unless by voluntary general appearance he submits himself to the court's jurisdiction.

The result of our conclusions is that the judgment appealed from ought to be and the same is affirmed.

Watson & Clemons for plaintiffs.

Robertson, Castle & Olson and *Marguerite K. Ashford* for defendants.

Syllabus.

MARY D. FREAR v. CHARLES T. WILDER, TAX
ASSESSOR FOR THE CITY AND COUNTY OF
HONOLULU, TERRITORY OF HAWAII.

No. 1275.

SUBMISSION UPON AGREED STATEMENT OF FACTS.

ARGUED SEPTEMBER 16, 1920.

DECIDED SEPTEMBER 27, 1920.

COKE, C. J., EDINGS, J., AND CIRCUIT JUDGE DEBOLT
IN PLACE OF KEMP, J., ABSENT.

STATUTES—*construction of statutes imposing taxes.*

It is a cardinal rule of construction that statutes imposing taxes are to be construed strictly against the government and in favor of the taxpayer and that no person and no property is to be included within their scope unless placed there by clear language.

SAME—*same.*

It is the established rule not to extend their provisions by implication beyond the clear import of the language used or to enlarge their operation so as to embrace matters not specifically pointed out. In case of doubt they are construed most strongly against the government and in favor of the citizen.

SAME—*sections 1305 and 1307 R. L. 1915 differentiated.*

Sections 1305 and 1307 R. L. 1915 were intended to serve separate and distinct purposes. The first levies an income tax upon the gains, profits and income derived from certain definite and plainly enumerated sources and fixes the rate of taxation, while the latter merely prescribes the method to be pursued by the taxpayer in returning his gross income from which his net taxable income is to be computed.

GIFTS—*gratuities inter vivos not deemed to be income.*

While gifts *causa mortis* usually fall within the scope of inheritance tax enactments Christmas gifts and other gratuities *inter vivos* are not deemed to be income and are not taxable as such under any of the existing laws of this Territory.

OPINION OF THE JUSTICES BY COKE, C. J.

This cause is here on a submission on agreed facts.

Opinion of the Justices.

It appears from the record that Mary D. Frear is a resident of Honolulu, Territory of Hawaii, and that Charles T. Wilder is tax assessor for the City and County of Honolulu, Territory of Hawaii; that on or about the 25th day of December, 1919, Mrs. B. F. Dillingham, mother of said Mary D. Frear, and a resident of said City and County of Honolulu, transferred and delivered personal property of the value of \$90,000 to her daughter Mrs. Frear as a Christmas gift of said property and that Mrs. Frear accepted said property as a Christmas gift; that thereafter in making out her general tax return as well as her special tax return to the tax assessor Mrs. Frear set forth the facts showing the receipt by her of said Christmas gift of the value of \$90,000 from her mother as aforesaid and claimed that the same was not taxable income under the general income tax laws of the Territory or under the special income tax laws thereof; that thereafter, in May, 1920, Charles T. Wilder, tax assessor, assessed the income taxes payable by said Mary D. Frear under said laws and included as a part of the income so assessed under each of said laws the value of said Christmas gift of \$90,000; that thereafter upon being advised of the action of the assessor Mrs. Frear protested the assessment and thereafter, under protest, with notice that action would be brought to recover the money so paid, she paid to the assessor the sum of \$848 as a part of the tax assessed against said Christmas gift of \$90,000 under the general income tax laws of the Territory, and further paid the sum of \$788 as a part of the tax assessed against said Christmas gift under the special income tax law.

Out of the controversy between the parties two questions are submitted for the decision of the justices of this court, to wit: (1) Whether the value of said gift is taxable income under the general income tax laws of the

Opinion of the Justices.

Territory (Ch. 94 R. L. 1915 and amendments thereto), and (2) Whether the value of said gift is taxable income under the special income tax laws of the Territory of Hawaii (being Act 117, S. L. 1915, and amendments thereto).

The first question submitted turns upon the construction of the provisions of chapter 94 R. L. 1915, and particularly upon the construction of sections 1305 and 1307 of said chapter. These sections are as follows:

“Sec. 1305. Rate on person's income. There shall be levied, assessed, collected and paid annually upon the gains, profits and income over and above fifteen hundred dollars, derived by every person residing in the Territory of Hawaii, from all property owned, and every business, trade, profession, employment or vocation, carried on in the Territory, and by every person residing without the Territory from all property owned, and every business, trade, profession, employment or vocation carried on in the Territory, and by every servant or officer of the Territory, wherever residing, a tax of two per cent. on the amount so derived during the taxation period as herein defined. * * *

“Sec. 1307. Income includes what. In estimating the gains, profits and income of any person or corporation, there shall be included all income derived from interest upon notes, bonds and other securities, except such bonds of the Territory, of Hawaii or of municipalities created by this Territory, the principal and interest of which are by the law of their issuance exempt from all taxation; profits realized within the taxation period from sales of real estate, including leaseholds purchased within two years; dividends upon the stock of any corporation; the amount of all premiums on bonds, notes or coupons; the amount of sales of all movable property, less the amount expended in the purchase or production of the same, and in the case of a person not including any part thereof consumed directly by him or his family; money and the value of all personal property acquired by gift or inheritance, and all

Opinion of the Justices.

other gains, profits and income derived from any source whatsoever during said taxation period."

The attorney general, representing the tax assessor, argues most forcibly in his able brief that the use of the expression "In estimating the gains, profits and income of any person" etc., to be found in section 1307, embodies the idea of the calculation of a tax and that by the construction of the two sections together it is conclusively shown that gifts *inter vivos* are included within the taxing provisions of the law. While on the other hand counsel for Mrs. Frear contend with equal emphasis that by section 1305 alone has the legislature exercised its power to levy a tax and that it has done so by definitely and clearly designating the kind and quality of income upon which a tax is imposed; that is to say, upon "the gains, profits and income over and above \$1500 derived by every person in the Territory from all property owned, and every business, trade, profession, employment or vocation carried on in the Territory" and that as a gift *inter vivos* is not included within any of the enumerated sources from which taxable gains, profits and income are derived, therefore such a gift is not within the purview of the statute. It is further urged in behalf of Mrs. Frear that section 1307 merely sets forth and designates the method of estimating the gross profits to be included in the return of the taxpayer as required by section 1310.

Of course if these two sections may properly be construed in the manner contended for by the attorney general it follows that income springing from sources not contemplated in section 1305 is subject to the income tax levied by virtue of that section. Section 1307 levies no tax and only by implication can it be held that the gains, profits and income from all the sources enumerated therein are taxable under section 1305. It is a cardinal rule of construction that a statute imposing taxes is to be

Opinion of the Justices.

construed strictly against the government and in favor of the taxpayers and that no person and no property is to be included within its scope unless placed there by clear language of the statute. (Sutherland Statutory Construction p. 462; Black's Federal Income Taxes, Sec. 27.) "In the interpretation of statutes levying taxes it is the established rule not to extend their provisions, by implication, beyond the clear import of the language used, or to enlarge their operations so as to embrace matters not specifically pointed out. In case of doubt they are construed most strongly against the government and in favor of the citizen." *Gould v. Gould*, 245 U. S. 151, where it is held that alimony paid monthly to a divorced wife under a decree of court is not taxable as income under the federal income tax act of October 3, 1913. See numerous authorities cited in the *Gould* case and also *Minister v. Bishop & Co.*, 3 Haw. 793, 794; *Apokaa Sug. Co. v. Wilder*, 21 Haw. 571; *Haiku Sug. Co. v. Johnstone*, 249 Fed. 103.

We cannot concur in the statement of the attorney general that all of the items required to be returned under the provisions of section 1307 are taxable income. Dividends on the stock of corporations are required to be returned under the provisions of that section but under the following section that income is exempt from taxation if the taxation of two per cent. has been assessed upon the net profits of the corporation. The salaries received by the members of this court must be returned under the provisions of section 1307 but they are universally recognized as being nontaxable by virtue of the provisions of section 80 of the Organic Act.

It is manifest to us that section 1305 and section 1307 were intended to serve separate and distinct purposes. The first levies an income tax upon gains, profits and income derived from certain definite and plainly enumer-

Opinion of the Justices.

ated sources and fixes the rate of taxation, while the latter merely prescribes the method to be pursued by the taxpayer in returning his gross income from which his net taxable income is to be computed.

We are not unmindful that there are expressions contained in the opinions of this court in *Halstead v. Pratt*, 14 Haw. 38 and *Wilder v. Haw'n Trust Co.*, 20 Haw. 589, which indicate that gifts are subject to taxation under sections 1305 and 1307. In the *Halstead-Pratt* case the question here involved was in no wise at issue and the court turned aside from the record in the case to remark that "We presume that, construing all parts of the act together, section 3 (now section 1307) may be regarded as enlarging section 1 (now section 1305) so as to include inheritances." In the *Wilder-Haw'n Trust Co.* case it appears that no question was raised respecting the legality of the tax imposed, the sole question being whether it should be paid by the trustee of the estate or by the annuitant. The court took it upon itself to say that "Under section 1280" (now section 1307) "income shall include money and the value of all personal property acquired by gift or inheritance." If it may be proper to construe those opinions as holding that a gift *inter vivos* is subject to income tax under the laws of the Territory, to that extent we are not in accord with them.

All that has been said may with perhaps greater force be repeated in the consideration of the second question involved, that is, Whether a gift is taxable under the special income tax laws of the Territory, the same being Act 117 S. L. 1915 and amendments thereto. The portions of these laws which are germane to the question under consideration read as follows:

"Section 1. Rate on person's income. In addition to the tax of two per cent., authorized to be levied, assessed and collected upon the gains, profits, and incomes of per-

Opinion of the Justices.

sons in the Territory of Hawaii under the provisions of chapter 94 of the Revised Laws of Hawaii, 1915, there shall be levied, assessed and collected annually upon the gains, profits and incomes over and above six thousand dollars (\$6,000.00) derived by every person residing in the Territory of Hawaii, from all property owned, and every business, trade, profession, employment or vocation carried on in the Territory, and by every person residing without the Territory, from all property owned, and every business, profession, employment or vocation carried on in the Territory, and by every servant or officer of the Territory, wherever residing, a tax of two per cent., on the amount so derived during the taxation periods defined by this Act; provided, however, that such tax shall not be levied or assessed upon money and the value of personal property acquired by will or inheritance otherwise taxed as such." (Sec. 1, Act 117 S. L. 1915 as amended by Sec. 1 Act 206 S. L. 1919.)

"Section 4. Other provisions of law applicable. All of the provisions of sections 1307 to 1316 of the Revised Laws of Hawaii, 1915, both inclusive, in so far as the same are consistent with this Act and may be used in furtherance of the purposes thereof, shall apply to this Act as fully as though incorporated herein." (Act 117 S. L. 1915.)

It is to be observed that gifts are not included within any of the provisions of either of the foregoing sections and while section 1307 is by reference incorporated into the section last above quoted yet we have already determined that section 1307 levies no tax upon gifts *inter vivos*.

Speaking generally of the subject under consideration it may be stated that while gifts *causa mortis*, that is, gifts made in contemplation of death, usually fall within the scope of inheritance tax enactments (as they do in this Territory. See Sec. 1323 R. L. 1915), Christmas gifts and other gratuities *inter vivos* are not deemed to be income. Indeed the usual and accepted import of the

Opinion of the Justices.

word "income" in no wise denotes a gift. (See Black's Federal Income Taxes, Sec. 49.) The Federal Revenue Act of 1918, section 213, specifically exempts from taxation the value of property acquired by gift and the treasury department in construing the purpose and effect of the earlier Federal Income Tax Act, that is, the act of 1913, held that "The value of property acquired by gift is not subject to income tax." (See Treasury Decision No. 2090, December 14, 1914.) Hence it may be said that the cheerful giver is still beloved and that tribute shall not be laid upon his generosity. Much less shall it be doubly taxed as contended for by the government in this case.

We conclude, therefore, that the value of the Christmas gift to Mrs. Frear from her mother is not taxable under the general income tax laws of the Territory, that is, chapter 94 R. L. 1915 and amendments thereof, and neither is the value thereof taxable under the special income tax laws of the Territory, being Act 117 S. L. 1915, and amendments thereof.

Judgment will be entered conformably to the views herein expressed.

U. E. Wild (Frear, Prosser, Anderson & Marx on the brief) for Mary D. Frear.

The *Attorney General* for the Tax Assessor submitted the case upon the brief.

Syllabus.

ANNIE K. FARDEN AND APAKI MANUWAI v.
WILFRED KELELANI RICHARDSON AND
HELEN PELE SHAW.

No. 1266.

APPEAL FROM CIRCUIT JUDGE SECOND CIRCUIT.

HON. L. L. BURR, JUDGE.

SUBMITTED SEPTEMBER '20, 1920.

DECIDED SEPTEMBER 28, 1920.

COKE, C. J., EDINGS, J., AND CIRCUIT JUDGE BANKS
IN PLACE OF KEMP, J., ABSENT.

PARTIES—*plaintiffs must have and show interest in controversy.*

It is elementary that a person appearing as plaintiff must have and show an existing remedial interest in the cause of action.

OPINION OF THE COURT BY COKE, C. J.

Suit was instituted by the complainants-appellees Annie K. Farden and Apaki Manuwai against the respondents-appellants Wilfred K. Richardson and Helen Pele Shaw to cancel two certain deeds made by Halepouli Shaw in favor of the respondents and conveying to them certain real property situated in the district of Lahaina, Island of Maui. In one of the deeds Annie K. Farden is named as the grantee of a portion of the property owned by Mrs. Shaw. It appears from the record that Mrs. Shaw died on the first day of March 1916 and that a day or two prior to her death she executed the deeds in question. These deeds are attacked by the complainants upon the ground that at the time of the execution thereof Mrs. Shaw did not possess sufficient mental capacity to execute them. The record also discloses that Annie K. Farden is a niece of Mrs. Shaw and that Wilfred K. Richardson and Helen Pele Shaw are

Opinion of the Court.

children whom she reared from their infancy. Wilfred K. Richardson has now reached legal age while Helen Pele Shaw is still a minor. At the conclusion of the hearing the circuit judge granted the prayer of the bill of complaint and decreed a cancellation of the deeds. From that decree the respondents have perfected an appeal to this court.

It may be said at the outset that the evidence in support of the allegation in the bill of complaint to the effect that Mrs. Shaw did not possess sufficient mental capacity to comprehend the effect of her acts when she executed the deeds in question is extremely weak and unsatisfactory. But aside from that question the decree of the court below cannot be sustained for the reason that the complainants have failed utterly to show that they or either of them have any interest in the subject-matter of the suit except that it appears in the record that Mrs. Farden is named as a grantee in one of the deeds which she together with the other complainant now seeks to nullify. It is of record that Mrs. Farden is a daughter of a deceased sister of Mrs. Shaw, and while the record indicates that Mrs. Shaw died without surviving issue there is no evidence therein showing or tending to show that her husband and father and mother are not still living. If they are living or if her father and mother or either of them are living Mrs. Farden, a niece, would not inherit any part of the property of the deceased and would have no interest in her estate and the decree rendered herein would be detrimental rather than beneficial to her.

Regarding the other complainant, Apaki Manuwai, it is to be observed that there was not the slightest attempt to show that he has even the remotest interest in the property involved in the suit. It is elementary that a person appearing as plaintiff must have and show an existing remedial interest in the cause of action. The

Syllabus.

complainants neglected to observe this universal rule and it follows that the evidence is insufficient to support a decree in their favor. In the present state of the record the decree appears to be adverse to the interests of Mrs. Farden while Manuwai is an entire stranger to the controversy.

The decree appealed from is reversed and the cause is remanded to the court below for further proceedings consistent with this opinion.

Eugene Murphy for complainants.

E. R. Bevins for respondents.

IN THE MATTER OF THE ESTATE OF
FREDERICK MEYER, DECEASED.

No. 1244.

APPEAL FROM CIRCUIT JUDGE FIRST CIRCUIT.

HON. J. T. DEBOLT, JUDGE.

ARGUED SEPTEMBER 20, 1920.

DECIDED OCTOBER 5, 1920.

COKE, C. J., EDINGS, J., AND CIRCUIT JUDGE BANKS
IN PLACE OF KEMP, J., ABSENT.

ESTATES—rights to letters of administration—order of priority.

Under section 2490 R. L. 1915 the first right to receive letters of administration is accorded to the wife of a deceased husband and the second right thereto is in the children of decedent who have reached their majority, but the widow is not entitled by filing her written request for the appointment of a stranger to the estate to advance the stranger to the same class and rank which she enjoys and especially is this true under a statute which recognizes no right of nomination in those entitled to administer.

SAME—same—same.

Our statute requires that the order of priority contained therein be observed by the probate judge unless satisfactory

Opinion of the Court.

cause is shown which in the eyes of the law will justify a disregard of the order of priority.

SAME—same—same.

A mere show of hands or a poll of the heirs of the decedent by which a majority register a preference for the appointment of a stranger to the exclusion of a son of legal age who is in all respects shown to be qualified does not in our opinion constitute a satisfactory cause.

SAME—same—same—effect of nomination of stranger by widow.

In the present case the widow by nominating a stranger as administrator of the estate attempted to arrogate to herself a right which the laws of this Territory do not confer, hence the effect of her action was to renounce her own right to the appointment and to pass it on to those within the next group in the order of priority; that is, to the children of legal age.

OPINION OF THE COURT BY COKE, C. J.

Frederick Meyer, a resident of Waianae, Island of Oahu, died intestate on or about the 22d day of August, 1919, leaving an estate within the jurisdiction of the circuit court of the first judicial circuit in real and personal property of the estimated value of \$26,000. Deceased left surviving him Mary Kukila Meyer, his widow, also six adult children, and a number of minor grandchildren, the offspring of three deceased children. Subsequently to the death of Meyer his widow filed a petition in the circuit court of the first circuit at chambers in probate praying for the appointment of J. M. Dowsett of Honolulu as administrator of the estate of the deceased. Shortly thereafter John J. Meyer, the second surviving son of the deceased, filed in said court a petition for the appointment of himself as administrator of the estate. This petition was joined in by George Meyer, the oldest son of the deceased. At the hearing of these petitions before the judge of the probate court John J. Meyer's qualification to act as the administrator of the estate of his deceased father was, we think, amply established. He

Opinion of the Court.

was shown to be a man thirty-two years of age, who is and for the past eleven and one-half years has been chief clerk of the U. S. naval station at Pearl Harbor, Oahu, and in charge of a staff of about 150 men. The other four children of the deceased were present at the hearing and in open court signified their desire to have Mr. Dowsett appointed. The probate judge thereupon made an order appointing Mr. Dowsett the administrator of the estate of the deceased fixing the administrator's bond at the sum of \$30,000. From this order the appellant John J. Meyer has perfected an appeal to the supreme court.

The qualifications and fitness of Mr. Dowsett to perform the duties of the trust are not questioned, the sole contention of the appellant being that as Mr. Dowsett is an entire stranger to the estate the probate judge was unauthorized by reason of the provisions of section 2490 R. L. 1915 to disregard the order of priority therein designated respecting the appointment of administrators. Section 2490 reads as follows:

"Appointment of administrators, priority. In the appointment of administrators upon the property of deceased persons, the following order of priority shall be observed:

1. The husband of a deceased wife;
2. The wife of a deceased husband;
3. The children being major;
4. The brothers and sisters of the deceased;
5. The cousins germane of the deceased;
6. Any bona fide creditor applying for administration;

"Provided, however, that the judge may, for satisfactory cause, disregard the order of priority herein prescribed."

The rule of law applicable to the question now before the court is stated in Cyc. as follows: "The right of particular persons to administer on the estate of a decedent

Opinion of the Court.

and the priority of right between two or more persons who ask for the issuance of letters to them are matters which are entirely regulated by statute; and the grant of administration must be to persons in the order and under the contingencies provided by the local statute, the court having as a rule no discretion in the matter, save where there are two or more persons equally entitled under the statute or where a question arises as to the fitness or qualifications of the person or persons primarily entitled to the appointment, or where the preference is given to two or more persons or classes of persons in the alternative. Where all the persons who under the statute have a right to administer have renounced or otherwise lost their right the court has a considerable discretion in the appointment of the administrator." (18 Cyc. 83, 84.) Under the early common law rule the court was entitled to make a grant of administration to whom it pleased but this subject is now generally regulated by statutes similar in import to the statutory provisions of this Territory. The priority of right is based primarily on nearness of relationship and extent of interest. These laws are in accord with natural justice and are based on the assumption that ties of marriage and consanguinity, and the effect of personal interest, will lead the persons enumerated in the statute in the order named to exercise care and attention in the management of the estate. In most jurisdictions the first right to receive letters of administration is accorded to the surviving husband or wife and the second to the children of decedent. This rule is in accord with our own statute. Not infrequently the statute permits the surviving spouse to nominate the administrator, in which case such nominee must be appointed unless shown disqualified. But no such right of nomination is recognized under the statutes of Hawaii.

The question here involved has frequently been pre-

Opinion of the Court.

sented to courts throughout the country where statutes bearing more or less similarity to our own have had consideration. One of the early cases is *Cobb v. Newcomb*, 19 Pick. 336. In that case the chief justice of the supreme court of Massachusetts in writing the opinion laid down the rule to be that "The right of administration may often be a valuable one, and is now to some extent fixed by law and does not depend upon the mere judicial discretion of the judge. * * * The right is first in the widow and next of kin, either or both, as the judge may order. In the present case the widow renounced her claim; but this did not give her the right to nominate another person to the exclusion of the next of kin." And see also 28 N. J. Eq. 236. The Pennsylvania rule is stated as follows: "It has never been understood, as is contended, that the widow or next of kin, or both combined, having the greatest stake in the estate, can pass by any one of the children, or next of kin, competent and willing to take, and vest the appointment in a stranger. The discretion given to the register is limited to a selection from those asking, if competent, in each class in their order. * * * When the widow renounces her right to administer it is the duty of the register to select from the children or next of kin a person or persons competent to perform the duties of administration." *McClellan's Appeal*, 16 Pa. 110. Some of the more recent cases are *Estate of Myers*, 9 Cal. App. 694; *State ex rel v. Superior Court of Thurston County*, 52 Wash. 149; *In re Nickals*, 21 Nev. 462; *Hayes v. Hayes*, 75 Ind. 395; *Larson v. Stewart*, 69 Wash. 223.

The *Myers Estate* case, *supra*, is given prominence in the briefs of appellant. In that case the heirs at law of the deceased were three daughters, to wit, Kate, Sophia and Ann. Kate and Sophia in writing nominated Thomas M. Roche for appointment as administrator while Ann

Opinion of the Court.

filed a petition praying for the appointment of herself. Under the California code the surviving wife or husband has the right to nominate some qualified person for appointment and there is a further provision in the code of that state authorizing the granting of letters of administration to one or more competent persons, although not otherwise entitled to the same, at the request of the person entitled, filed in court. In disposing of the question thus presented the California court held that the effect of the nomination by the two daughters, who were entitled to letters, of one not so entitled was to renounce their personal rights to letters; and in such case the rights of the remaining daughter, who did not join in such nomination, were unaffected and remained absolute and the court had no discretion to do otherwise than to grant her petition for letters of administration.

Counsel for appellee refers to *Larson v. Stewart*, *supra*, as an authority sustaining the action of the probate judge in the present case. A careful review of this case does not justify the claim which counsel makes for it. The statute of the State of Washington, like that of California and many other States, confers upon the surviving husband or wife the right to nominate the administrator of his or her deceased spouse. It appears in the *Larson-Stewart* case that the deceased left no wife surviving him but did leave several children, two of whom were of legal age and entitled to letters of administration. These two children waived their right to administer and nominated a Mr. Stewart whom the court found to be a suitable and competent person to administer the estate. Martin Larson, a creditor of the deceased, petitioned for appointment. At the conclusion of the hearing the court appointed Stewart and Larson, the creditor, appealed. Under the Washington statute the husband or wife or such person or persons as he or she may request to be

Opinion of the Court.

appointed are placed in the first class; the next of kin, first the child or children, second the father or mother, third the brothers or sisters, and fourth the grandchildren, are placed in the second class, while within the third class are the creditors. The statute does not by express terms recognize the right of the children to nominate some suitable person for appointment as administrator of the estate of their deceased parent, but the Washington court construed the statute so as to include that right. In the opinion the court say: "We are not unmindful of the insistence of counsel (for appellant) that each of the conditions named in the proviso must concur before a stranger can be appointed; that is, that there must be no relative or next of kin and that the heirs and creditors must have waived. * * * *And this may be so in so far as the rights of relatives and next of kin are concerned.* But we prefer to hold that it is not so to the extent of giving a creditor preference over the nominee of a preferred class. The right of the creditor is saved when there is due administration," etc. Here the rights of relatives and next of kin are concerned, hence we are dealing with a case entirely dissimilar upon the facts to the Washington case, and unlike the statute of that State the Hawaiian statutes confer no right of nomination whatsoever. In *Estate of Daggett*, 15 Ida. 504, under a statute which confers the right of appointment upon the surviving husband or wife, the court held that one who belongs to a preferred class is not entitled by filing his written request to advance one who belongs to an inferior class to the rank of the one making the request. If this is the correct rule how then may a person who is herself entitled to administer, by filing a request for the appointment of an entire stranger to the estate, advance the stranger to the same rank and class as the one making the request under a statute which recognizes no right of

Opinion of the Court.

nomination? If the contention of appellee is sound then the many legislative enactments conferring the right of nomination upon the surviving spouse have been to no purpose because that right exists even in the absence of statute.

Our statute requires that the order of priority contained therein must be observed by the probate judge unless satisfactory cause is shown which in the eyes of the law will justify a disregard of the order of priority. The question here involved then is resolved to this: Was there satisfactory cause to justify the probate judge in disregarding the order of priority?

It is obvious that many causes might be contemplated and shown to exist which the law would recognize as satisfactory and which would justify the probate judge in departing from the order of priority specified in section 2490, but a mere show of hands or a poll of the heirs of the decedent, by which a majority register a preference for the appointment of a stranger to the exclusion of a son of legal age and who is in all other respects shown to be qualified, does not in our opinion constitute a satisfactory cause. The law contemplates something more than a mere showing which is satisfactory to the probate judge in order to warrant a departure from the order of preference set forth in the statute. If the rule were otherwise the judge's discretionary power would be absolute and not reviewable. The statute could thus be abrogated with impunity and at the mere whim or caprice of the judge. The phrase "satisfaction of the court," in the federal statute providing that the facts to justify the naturalization of an applicant shall be established to the satisfaction of the court, shows that a discretion is vested in the court to determine whether an alien is fit for admission, but such discretion is not arbitrary and must be a sound judicial discretion and if opposed is subject to review

Opinion of the Court.

and the discretion must be regulated according to known rules of law and is legal and not personal discretion. *United States v. Hasky*, 88 N. E. 1031; 14 Cyc. 384.

In the present case the widow by nominating Mr. Dowsett as administrator of the estate attempted to arrogate to herself a right which the laws of this Territory do not confer, hence the effect of her action was to renounce her own right to the appointment and to pass it on to those within the next group, designated in the order of priority; that is, to the children of legal age. Section 2490 R. L. 1915 means that the order of priority therein set forth shall be observed unless a cause which the law recognizes as satisfactory to warrant a disregard thereof shall have been established. In the present case no such showing was made.

The order appealed from is reversed and the cause remanded to the lower court for proceedings consistent with this opinion.

B. S. Ulrich (Thompson, Cathcart & Lewis and C. F. Cook on the brief) for appellant.

I. M. Stainback for appellee.

M. F. SCOTT, ET AL., v. C. K. AI.

No. 1283.

APPEAL FROM CIRCUIT JUDGE FIRST CIRCUIT.

HON. J. J. BANKS, JUDGE.

ARGUED SEPTEMBER 30, 1920.

DECIDED OCTOBER 7, 1920.

COKE, C. J., EDINGS, J., AND CIRCUIT JUDGE DeBOLT
IN PLACE OF KEMP, J., ABSENT.

OPINION OF THE COURT BY COKE, C. J.

This controversy in one form or another has persistently haunted this court for the past twenty-three years.

Opinion of the Court.

Its reappearance has usually been the result of the blunder of counsel on one side or the other. It is now before us on the appeal of the Scotts and those interested with them from an order of the circuit court directing the refund to the appellee, C. K. Ai, of the sum of \$1168.30 out of the sum of \$2185.23, which by order of Court Ai was heretofore required to pay into court. This sum represented the amount of rent with interest which Ai wrongfully collected from tenants occupying a portion of the hui lands of Holualoa, Island of Hawaii. Out of this fund the Scott interests were found to be entitled to the sum of \$1016.93, while the Castle interests were entitled to \$1168.30, the amount now in controversy. It was held by this court (25 Haw. 386) that the Castle interests had waived their right to participate in the fund. The Scott interests now urge that they should be paid the sum which otherwise would have gone to the Castle interests although the entire damage sustained by them by reason of the wrongful occupancy of a part of the hui lands by Ai or his tenants has been paid to them. They clearly have neither a moral nor a legal claim to the sum which but for the waiver would have been paid to the Castle interests.

Counsel for appellants erroneously assumes that because his clients have suffered damages by reason of the occupancy of portions of the hui lands by persons other than Ai or his tenants, and for which damages they have never been reimbursed, the fund now in question should be applied to the liquidation of those damages. Of course the fund paid into court by Ai can be properly used only to satisfy the claim of the hui members against him. The Scott interests received their full quota of the claim against Ai and the Castle interests waived their claim, hence the court properly directed a return of the fund,

Syllabus.

which but for the waiver would have been paid to the Castles, to its original source, that is, to Ai.

The decree appealed from is affirmed.

M. F. Scott for plaintiffs.

W. L. Stanley (*Smith, Warren & Stanley* on the brief) for defendant.

HEE FAT v. CHANG CHIP, CHANG CHIN, CHUN
TIN AND FONG KOON CHAN.

No. 1288.

APPEAL FROM CIRCUIT JUDGE FIRST CIRCUIT.

HON. J. T. DEBOLT, JUDGE.

ARGUED OCTOBER 5, 1920.

DECIDED OCTOBER 12, 1920.

COKE, C. J., EDINGS, J., AND CIRCUIT JUDGE FRANKLIN
IN PLACE OF KEMP, J., ABSENT.

COURTS—*jurisdiction in equity matters.*

Under section 2472 R. L. 1915 the several circuit courts throughout the Territory possess jurisdiction of matters where relief in equity is prayed for without regard to where the rem is located or where in the Territory the parties may reside.

SAME—*same.*

But a complainant in equity does not enjoy as a matter of of right a roving commission to institute and maintain his suit in any of the circuit courts which he may choose.

SAME—*same.*

Where concurrent jurisdiction in equity cases is reposed in several courts whether that jurisdiction will be exercised or declined by one of such courts rests largely in the discretion of the judge and depends upon the circumstances of each case.

SAME—*same.*

The attempt of the petitioner in the present case to draw the respondents away from the jurisdiction where all the parties reside was properly held by the judge of the court below to be inequitable and unjust.

OPINION OF THE COURT BY COKE, C. J.

The appellant Hee Fat instituted in the circuit court of the first circuit a suit in equity against the appellees Chang Chip, Chang Chin, Chun Tin and Fong Koon Chan for the dissolution of a copartnership known as the Wai-lua Rice Mill Company and Poi Factory. In addition to a dissolution the petitioner also asked for an accounting between the parties. All of the parties to the suit are residents of the Island of Kauai and the business of the copartnership is conducted on that island. Respondents filed a demurrer to the bill of complaint, the third ground of which is as follows: "That the petitioner does not offer to do equity, and in particular, though he resides on the Island of Kauai within the fifth judicial circuit and both the petitioner and respondents do business on said Island of Kauai, petitioner has ignored the circuit court of the fifth judicial circuit and comes to this island and this court and petitions this court for an accounting that will necessarily require on any contested hearing the attendance of defendants and witnesses, of transportation and loss of time, and without any offer on the part of petitioner to pay any of the unnecessary expense thus to be incurred." The demurrer came on for hearing before the Hon. John T. DeBolt, second judge of the first judicial circuit, who decided that the ground of demurrer above set forth was well taken. The demurrer was therefore sustained and the bill dismissed without prejudice. In sustaining the demurrer the judge expressed his views thereon in the following language: "The demurrer, as it seems to me, should be sustained on the ground that all of the parties to this suit, petitioner and respondents, reside on the Island of Kauai, within the fifth judicial circuit; and for the additional reason that the copartnership business involved in this suit is also located there. There is no allegation or showing of any fact or reason whatsoever why the cause cannot be heard in the

Opinion of the Court.

fifth circuit as well as here, neither is there any allegation or showing of any fact or reason why the cause should be heard here. And it is obvious that it would be unjust, unfair and inequitable and would unnecessarily add to the expense of all concerned to have the cause tried in this circuit. To emphasize this phase of the question, let us suppose that the petitioner had chosen to bring the suit in Hilo, or in Kailua, or in Wailuku rather than in Honolulu. If the suit were filed in Kailua it is possible that the cause could be tried either there or at North Kohala or in Waiohinu. Moreover, the calendar of this court is overcrowded with cases instituted by residents of this circuit. Therefore, inasmuch as there appears no reason in justice, equity or otherwise why the case cannot be properly heard before the judge of the fifth circuit and in the due exercise of a sound judicial discretion, and in the interest of justice as it seems to me, I decline to assume the jurisdiction in this case for the reasons stated. The demurrer is sustained" etc. From the decree of the court sustaining the demurrer the petitioner has brought the cause to this court on appeal.

Section 2472 R. L. 1915 provides that "In addition to the jurisdiction in equity otherwise conferred, the several circuit judges shall have original and exclusive jurisdiction of every original process whether by bill, writ, petition or otherwise, in which relief in equity is prayed for, except when a different provision is made," etc.

Under this statute it cannot be doubted that the several circuit courts throughout the Territory possess concurrent jurisdiction of matters where relief in equity is prayed for without regard to where the rem is located or where in the Territory the parties may be domiciled. This is the interpretation and the effect of the statute as announced by this court in *Wailuku Sugar Co. v. Cornwall*, 10 Haw. 476, 479, and again in *McBryde Sugar Co.*

Opinion of the Court.

v. *Koloa Sugar Co.*, 19 Haw. 106, 116. It therefore follows that the circuit court of the first judicial circuit sitting in equity had jurisdiction of the parties and of the cause in the present case and it remains only to be determined whether the court was clothed with a discretionary power to refuse jurisdiction, and if that power existed, whether under the circumstances of this case the court was justified in exercising its discretion in the manner hereinabove indicated.

All of the parties interested reside on the Island of Kauai and within the fifth judicial circuit; the Island of Kauai is approximately 80 miles by water from the Island of Oahu where the circuit court of the first judicial circuit functions. There is no pretense at any showing in the bill or otherwise why the parties should be required to undergo the expense and inconvenience of a sea voyage from Kauai to Honolulu and here remain in attendance until the cause is tried and determined in the circuit court of the first circuit when the circuit court of the fifth circuit, which sits in equity at all times, at Lihue, Kauai, could try the issues with less expense and inconvenience to all concerned. If the petitioner can as a matter of right compel the respondents to come to Honolulu to defend this cause then, as pertinently remarked by the judge of the court below, he might with equal right have instituted his suit before the circuit court at Hilo on the Island of Hawaii, some 250 miles distant from Kauai, and thus have required the attendance of the respondents upon the court there. It seems to us that equity and good conscience would refuse to sanction any such imposition. While equity suits are cognizable by the several circuit courts in the Territory it does not follow that a complainant in equity enjoys as a matter of right a roving commission to institute and maintain his suit in any of the circuit courts which he may choose. See

Opinion of the Court.

Rice v. Tarver, 4 Ga. 571. It is a recognized rule that where concurrent jurisdiction is reposed in both equity and law courts the equity court will generally decline to exercise jurisdiction where the remedy at law is complete and adequate and no special circumstance exists demanding the interference of equity. And where concurrent jurisdiction is recognized, whether it will be exercised or declined rests largely in the discretion of the court. 16 Cyc. 36. And with equal force it may be said that where concurrent jurisdiction in equity cases is reposed in several courts whether that jurisdiction will be exercised or declined by one of such courts rests largely in the discretion of the judge thereof and depends upon the circumstances of each case. It is not from any inherent want of power or jurisdiction in the equity court of the first circuit, but rather from the standpoint of policy and fairness which justifies the judge of that court in relegating the petitioner to the court of the domicil of the parties for a redress of his grievances.

The attempt of the petitioner in the present case to draw the respondents away from the jurisdiction where all the parties reside was properly held by the judge of the court below to be inequitable and unjust.

The decree appealed from is affirmed.

J. Lightfoot for petitioner.

L. A. Dickey (*P. L. Rice* with him on the brief) for respondents.

Syllabus.

IN RE TAXES WAIAKEA MILL COMPANY.

No. 1289.

APPEAL FROM TAX APPEAL COURT FOURTH CIRCUIT.

SUBMITTED SEPTEMBER 30, 1920.

, DECIDED OCTOBER 16, 1920.

COKE, C. J., EDINGS, J., AND CIRCUIT JUDGE DEBOLT
IN PLACE OF KEMP, J., ABSENT.

TAXATION—*assessable value of growing crops.*

In determining the value of growing crops of sugar cane for taxation purposes it is proper to take into consideration the prevailing market price of sugar.

SAME—*same.*

But a price arbitrarily fixed by the assessor and not shown to exist cannot properly be used in estimating the value of the crops.

OPINION OF THE COURT BY COKE, C. J.

The appellant, the Waiakea Mill Company, returned its property for taxation purposes as of January 1, 1920, at the value of \$773,661.38. Thereafter the tax assessor increased the amount to \$1,250,000. The mill company appealed to the tax appeal court of the fourth judicial circuit. Upon a hearing before that tribunal the assessment of the tax assessor was affirmed and the company has appealed to this court.

At the hearing before the tax appeal court counsel for the company and the attorney general agreed that the value of the property of the company, exclusive of growing crops, should be fixed at \$645,468.80. Hence the only issue presented by this appeal is respecting the value of the growing crops of 1920 and 1921.

The issues which are twofold are clear-cut and simple

Opinion of the Court.

of solution. First it is to be determined whether the estimate of the assessor placing the 1920 crop at 5000 tons, or the testimony of Mr. Forbes, the manager of the company, who placed it at 2044 tons, is to be accepted; and secondly, the value of the crops of 1920 and 1921 is to be ascertained.

There is no dispute respecting the tonnage for the year 1921 which was placed at 3000 tons. The tax assessor bases his estimate of the quantity of the 1920 crop upon what he testified was told him by the manager of the company, his testimony in this behalf being that the manager in January estimated the 1920 crop at 5000 tons. As against this the manager of the company testified that the 1920 crop actually yielded 2044 tons of sugar. His evidence upon this point is positive and there was no attempt to disprove his figures. It seems to us, therefore, that the tax appeal court under the circumstances should have accepted the positive testimony of the manager of the mill company as against a statement, not under oath, which the assessor claims was made to him by the manager of the company at some indefinite date. If the evidence of the manager of the company was erroneous that fact could have been easily shown and in the absence of any such showing the evidence of the manager of the company must be held to be conclusive.

Both parties attempted to determine the value of the growing crops of cane by estimating the price per pound which the sugar output would sell for when finally placed on the market. The price fixed by the manager of the company was 7 28/100 cents per pound and was based upon the market quotation on January 1, 1920, while the assessor fixed the price per pound at 13 cents and estimated the value of the crops for 1920 and 1921 on that basis. The assessor frankly admitted that his estimate of 13 cents per pound was arrived at some time after the 1st of January and was simply a guess. It was based upon nothing more

Opinion of the Court.

substantial than the opinion of the assessor that the price of sugar would advance and that there existed a shortage of that commodity throughout the world.

This court has already announced the rule to be that "Under normal conditions when the price of sugar on the first of the year might not be the price at which it would sell throughout the year it would be proper to consider the average price which could be expected over a period of years in estimating the value of the crop for that year." *Re Taxes Onomea Sugar Co.*, 25 Haw. 278, 287. See also *Gay & Robinson v. Assessor*, 17 Haw. 227, 230. The method prescribed in the foregoing opinions was not pursued by the assessor in the present case. There was no showing that the average price which could be expected over a period of years was taken into consideration, nor was there any showing whatsoever that sugar was of the value of 13 cents per pound at the time the price was determined upon by the assessor nor at any other date. The only tangible evidence in the record before us respecting the price of sugar is the evidence of the manager of the company fixing the price on the 1st day of January, 1920, at 7 28/100 cents per pound. The appellee produced no evidence tending to fix the price which the company might expect for its sugar during the years 1920 and 1921. The failure to make any such showing left the tax appeal court, as it leaves this court, with no alternative but to accept the market quotation on the 1st day of January, 1920, as the price which the company's future crops could reasonably be expected to bring. The whole case of the Territory falls for lack of evidence to support it.

Of course in assessing a concern, such as the appellant, as an enterprise for profit, its future prospects may properly be taken into consideration in determining the value of the property of the enterprise as a whole. But in the present case, and upon the record now before us, the issues

Opinion of the Court.

are confined to a determination of the quantity and value of the two growing crops of sugar cane in existence on the 1st day of January, 1920, one of which would mature in the year 1920 and the other in 1921.

Rules and methods of arriving at the value of an enterprise for profit for taxation purposes have been announced by this court in numerous decisions. Perhaps the outstanding decisions on the subject are *Tax Assessment Appeals*, 11 Haw. 235 and *Re Taxes Onomea Sugar Co.*, *supra*.

Conformably to these opinions and our own views we are compelled to disagree with the decision of the tax appeal court. The testimony shows that it cost \$104.62 per ton to harvest, mill and market the 1920 crop. Placing the market value at 7 28/100 cents per pound the market price per ton would be \$145.60; thus a profit of \$40.98 per ton, or a total profit of \$83,763.12 for the 1920 crop is shown. The estimated yield for 1921 is 3000 tons. The value of the 1921 crop on the 1st day of January, 1920, may properly be placed at one-half of the value per ton of the 1920 crop. This method of computation has heretofore had the sanction of this court. The 1921 crop was therefore worth \$61,470 on the date of the assessment. The total value of the two crops combined is \$145,233.12, which, added to \$645,468.18, the value of the other property not in dispute, would result in a total valuation of \$790,701.30.

The decision of the tax appeal court is reversed and the taxable value of the property of appellant is fixed at the sum of \$790,701.30.

Robertson, Castle & Olson for the taxpayer.

J. Lightfoot, First Deputy Attorney General, for the assessor.

Syllabus.

JAMES T. TAYLOR *v.* CITY AND COUNTY OF HONOLULU, BY WILLIAM H. HEEN, CITY AND COUNTY ATTORNEY, AND D. L. CONKLING, CITY AND COUNTY TREASURER.

No. 1290.

SUBMISSION UPON AGREED STATEMENT OF FACTS.

SUBMITTED OCTOBER 25, 1920.

DECIDED OCTOBER 27, 1920.

COKE, C. J., KEMP AND EDINGS, JJ.

PENALTIES—*frontage tax.*

Where one is called upon to pay a street assessment under the frontage tax laws, which he believes to be illegal, he has two courses open to him. He may resist payment at the hazard of all penalties in case the decision shall be against him, or he may pay the assessment under protest and then in case of a decision in his favor demand the return of his money.

SAME—*same—injunction.*

The fact that the property holder in good faith sues out a temporary injunction restraining the City and County from collecting the assessment does not suspend the operation of the statute which levies a penalty of one per cent. per month for the period of default.

OPINION OF THE JUSTICES BY COKE, C. J.

This controversy comes here on an original submission. The agreed facts may be summarized as follows: James T. Taylor is the owner of several lots of land in the vicinity of Laimi, Park and Puiwa roads, Nuuanu Valley, City of Honolulu. Prior to March, 1918, the City and County of Honolulu constructed a concrete street along the Taylor property under and by virtue of the provisions of chapter 112 R. L. 1915, as amended.

Opinion of the Justices.

known as the Frontage Tax Law. An assessment was levied pursuant to the provisions of said law against the several lots owned by Taylor amounting in all to \$5739.19. Conformably to the statute the treasurer of the City and County of Honolulu notified Taylor of the amount of the assessment and of the fact that the same would become due on March 7, 1918, and that within thirty days after said date he must either pay the total sum of the assessment or elect to pay the same in instalments of ten per cent., and that in case he elected to pay in instalments the first instalment must be paid within the specified time and that if he did not pay either the whole amount or the instalments as they became due the said treasurer would declare the said assessment delinquent and would proceed to collect the same in the manner prescribed by law. On the 1st day of April, 1918, Taylor instituted a suit in equity in the first judicial circuit against the City and County of Honolulu and caused a temporary injunction to issue restraining the City and County from collecting the assessment or any part thereof. Thereafter the cause reached the supreme court on appeal, where it was held in an opinion rendered on the 23d day of July, 1919, that the bill of complaint filed by Taylor did not allege sufficient facts to warrant the intervention of a court of equity and the injunction was therefore dissolved. In November, 1919, Taylor paid to the City and County of Honolulu the first and second instalments due upon his property together with interest on the total amount due at the rate of six per cent. per annum and at the same time deposited the further sum of \$545.01, the latter amount being the total amount of penalty which will be due from him to the City and County of Honolulu in case this court should decide that he is liable therefor. Hence this controversy is in respect to the \$545.01 which Taylor claims he should not be required to pay and

Opinion of the Justices.

which the City and County on the other hand contends must be paid by him under the provisions of the statutes.

Sections 1804, and 1805 R. L. 1915 as amended, read as follows:

“Sec. 1804. Instalments payable when. In case of an election to pay any assessment in instalments, such assessments shall be payable in not less than five nor more than ten equal annual instalments of principal with interest, in all cases, on the unpaid principal, payable annually at a rate not exceeding six per cent. per annum. The number of instalments and period of payment and the rate of interest shall be as determined by the supervisors.”

“Sec. 1805 (as amended by Act 239 S. L. 1917). Effect of failure to pay instalment. Failure to pay any instalment, whether of principal or interest, when due, shall cause the whole of the unpaid principal to become due and payable immediately and the whole amount of unpaid principal and accrued interest shall thereafter draw interest at the rate of one per centum per month or fraction of a month until the day of sale as hereinafter provided; but at any time prior to the day of sale the owner may pay the amount of all delinquent instalments with interest on the whole amount of the unpaid assessment at one per centum per month or fraction of a month, as aforesaid, and all penalties accrued, and shall thereupon be restored to the right thereafter to pay in instalments in the same manner as if default had not been made. The owner of any land assessed, not in default as to any instalment or payment, may at any time after the expiration of the first thirty-day period pay the entire unpaid principal with interest thereon to the next subsequent annual date for the payment of instalments.”

Mr. Taylor contends that under the provisions of these two sections as above set forth no penalty for failure to pay assessments when due accrued against him owing to the pendency of the injunction proceedings and that upon the dissolution of the injunction and upon

Opinion of the Justices.

payment of all the unpaid instalments with interest at six per cent. per annum on the whole amount of the unpaid assessment he is entitled to be restored to the right thereafter to pay the assessment in the instalments provided by law. The City and County of Honolulu contends that the only manner in which Taylor may be restored to the right to pay his assessment in instalments is by paying the amount of all unpaid instalments with interest on the whole amount of the unpaid assessment at the rate of one per cent. per month in accordance with section 1805.

Counsel for Mr. Taylor while conceding that his client is liable for interest at the rate of six per cent. per annum after the assessment fell due and until it was paid submits that the injunction proceeding instituted by him in good faith maintained the *status quo* between the parties while the injunction was in force and that the dissolution of the injunction restored the parties to their former status and placed them in the identical position in which they stood at the date the injunction proceedings were instituted. Ordinarily where an injunction is improperly obtained the party who causes the same to be issued is liable in damages for the actual, natural and proximate result of the wrong committed. In the present instance the damages are liquidated by the statute and are fixed at one per cent. per month for the period of default. The fact that Mr. Taylor acted in good faith in seeking the injunctive relief we think places him in no better position than had he in good faith refused to pay the assessment without having recourse to the courts. The provisions of section 1805 are explicit and provide for the penalty of one per cent. per month in the event of nonpayment without regard to the reasons, meritorious or otherwise, which may have caused the party to incur the default. The course open to Mr. Taylor in the first

Opinion of the Justices.

instance was we think identical with that which he has pursued in this proceeding, that is to say, he should have paid under protest the amount of taxes which became due from him during the pendency of the injunction suit and in case that proceeding resulted favorably to him demanded a return of the money which he was wrongfully required to pay. By failure to do so he assumed the hazard of all penalties in case the decision was adverse to him. This rule has the sanction of the courts and is succinctly expressed by the supreme court of Indiana in the following language: "In the event that one is called upon to pay a tax which he believes to be illegal he has two courses open to him. He may resist payment at the hazard of all penalties in case the decision shall be against him; or he may pay the tax under protest, and then, in case of the decision in his favor, demand the return of his money." *Western Union Telegraph Co. v. The State*, 146 Ind. 54, 63. See also *Power v. City of Detroit*, 139 Mich. 30; *C. R. & M. R. Co. and I. R. L. Co. v. Carroll County*, 41 Ia. 153. In the Iowa case last cited the court said: "It is urged that the penalties are onerous, inequitable and oppressive; that they have accrued while plaintiffs were in good faith contesting the rights of defendant to enforce them and that the questions of law involved were doubtful and justified the plaintiffs in resisting the payment of the taxes. That plaintiffs will suffer a hardship in the payment of these heavy penalties is very apparent; that the questions involved in the cause were doubtful, and the litigation has been prosecuted in good faith may be conceded, but these things give us no authority to annul the statute and remit a penalty explicitly provided for, and in which defendant has a vested right. The delay incident to the progress of this cause, especially in this court, has been great, and plaintiffs have been subject thereby to suffer

Opinion of the Justices.

from the enormous increase of the penalties. This is no ground for relief; it is an incident of litigation, the risk of which parties are required to assume. None of these considerations will authorize us, without law or precedent, to abate any part of the sum to which defendant is entitled under the law. With the hardships of the law or with those resulting fortuitous circumstances connected with its administration we have nothing to do. When the rule is admitted that equity will not relieve against penalties imposed by statute arguments based upon hardships furnish us no avenue of escape from its operation. The relief asked for upon the application under consideration is refused."

In the case under consideration there was no unusual delay either in this court or in the court below nor are the penalties onerous or oppressive. The proceedings in equity were heard and finally determined with expedition and the penalty, including interest and all other charges, is one per cent. per month on the total amount of the assessment for approximately ten months.

Our conclusion is that the City and County of Honolulu is entitled to have and recover from Taylor the amount here in dispute, to wit, the sum of \$545.01.

W. W. Thayer for plaintiff.

W. H. Heen, City and County Attorney, and *R. A. Vitousek*, First Deputy City and County Attorney, for defendants.

Syllabus.

IN THE MATTER OF THE APPLICATION OF HANNAH P. SPRINGER FOR A WRIT OF PROHIBITION DIRECTED TO THE HONORABLE J. W. THOMPSON, JUDGE OF THE CIRCUIT COURT OF THE THIRD JUDICIAL CIRCUIT OF THE TERRITORY OF HAWAII, AND MALCOLM MORRIS SPRINGER.

No. 1279.

ORIGINAL.

SUBMITTED NOVEMBER 1, 1920.

DECIDED NOVEMBER 10, 1920.

COKE, C. J., KEMP AND EDINGS, JJ.

STATUTES.

Section 2930 R. L. 1915 held to be a valid and subsisting statute.

DIVORCE.

The term "divorce" in its accurate sense denotes dissolution or suspension by law of the marital relation. The expression is broad and comprehensive and includes every kind of divorce recognized by the statutes of the Territory.

SAME—*cross-libel*.

Where a party sets in operation the machinery of the law for the purpose of obtaining a divorce, and without regard to whether the divorce sought be complete dissolution or merely suspension of the marital relations, the other party may interpose a cross-libel and have relief thereon as fully and effectually as in an original petition for divorce.

OPINION OF THE COURT BY COKE, C. J.

In July, 1919, the petitioner Hannah P. Springer filed her complaint in the circuit court of the third judicial circuit against the respondent Malcolm M. Springer alleging that "the libellee for more than sixty days last past, to wit, since the 7th day of November, 1918, has wilfully

Opinion of the Court.

neglected to provide the said libellant the common necessities of life, having the ability so to do, and has compelled libellant to live upon the charity of friends, notwithstanding libellee is abundantly able to support libellant and is in constant receipt of wages sufficient for their joint support, to wit, over two hundred dollars (\$200.00) per month." The petitioner concluded her libel with a prayer for a decree against the respondent of separation from bed and board and for such other and further relief as to the court might seem proper. The respondent interposed a general denial and by way of further answer set up a cross-bill praying for an absolute divorce from petitioner. To the cross-bill Mrs. Springer interposed a general denial. Thereafter and to wit on the 27th day of September, 1919, the petitioner dismissed her complaint in the divorce action and moved the court for an order dismissing the cross-libel of the respondent. The circuit court refused to grant petitioner's motion to dismiss respondent's cross-libel whereupon the petitioner filed in this court her petition praying that an alternative writ of prohibition issue out of and under the seal of this court directed to the Honorable J. W. Thompson, judge of the circuit court of the third judicial circuit of the Territory of Hawaii, and to Malcolm M. Springer, commanding and directing them until the further order of this court to refrain and desist from proceeding herein and commanding said judge to refrain from taking jurisdiction of the cross-libel of Malcolm M. Springer for divorce filed as aforesaid. Pursuant to said petition an alternative writ of prohibition was issued out of this court. The respondent Thompson filed a return to the petition and upon the issues thus presented the cause is before us for determination.

The questions involved are two-fold. First it is contended by the petitioner that the circuit court is without jurisdiction for the reason that section 2930 R. L. 1915 is

Opinion of the Court.

a nullity, and second if the validity of section 2930 is sustained a cross-libel can only be filed in an action for divorce from the bond of matrimony and not in an action of separation from bed and board.

The validity of section 2930 R. L. 1915 is attacked upon the ground that because when that section was originally passed by the legislature at its session in 1913 said statute was entitled "An Act to amend the Revised Laws of Hawaii by adding thereto a new section to be known as section 2930a" and that it therefore was in violation of section 45 of the Organic Act of the Territory which requires that "each law shall embrace but one subject which shall be expressed in its title," the point being made that the subject is not expressed in the title of the act.

Under Act 11 S. L. 1913 the legislature created a compilation commission authorized to compile all the laws of the Territory of Hawaii as they existed following the adjournment of the legislature of that session. The commission thus created did compile the laws of the Territory and presented the result of its labors to the legislature at the 1915 session in the form now known as the Revised Laws of 1915. The legislature at that session by an act embracing but one subject, which was expressed in its title, enacted into law the entire compilation prepared and presented by the compilation commission. The statute referred to is Act 7 S. L. 1915 which is entitled "An Act to Enact the Revised Laws of Hawaii of 1915," the first section of which is as follows: "Sections one to four thousand two hundred and twenty-five, both inclusive, set forth on pages ninety-one to one thousand four hundred and eighty-two, both inclusive, of the volume prepared by the commission appointed under the provisions of Act eleven of the Session Laws of the year one thousand nine hundred and thirteen, are hereby enacted as law, to take

Opinion of the Court.

effect on the approval of this Act, and the same shall be designated and cited as the Revised Laws of Hawaii 1915."

The statute now in question is included within the Revised Laws of 1915 and by virtue of the enactment of those laws at that session of the legislature its prior status ceased to be material to this inquiry. The subject in all its phases is dealt with at length in the opinion of this court in *Re Tom Pong*, 17 Haw. 566. With that opinion we are in entire accord and by the force of its reasoning the validity of section 2930 is upheld.

Having concluded that the section involved is a valid and subsisting statute we will pass on to the consideration of the second question presented which involves a construction of the rights conferred by section 2930. This statute reads as follows: "A cross-libel may be filed in any action for divorce and affirmative relief granted thereon as fully and effectually as in original petitions for divorce."

The petitioner contends that the term "divorce" as used in section 2930 has reference solely to a divorce from the bond of matrimony and therefore the statute does not authorize the interposition of a cross-libel in an action for separation. In early times divorces were recognized to be of two sorts, that is to say, a divorce from the bond of matrimony, or in the latin form of expression, *a vinculo matrimonii*; second, the suspension divorce from bed and board, *a mensa et thoro*, sometimes called a separation, and later was added a third species, more accurately termed a sentence of nullity, which was properly designated as a divorce where the marriage was voidable but not void. Of course where the marriage was absolutely void the term divorce could not properly be applied thereto because the marriage never had a legal existence and a divorce presupposes a prior marriage. Our legislators

Opinion of the Court.

appear to have adopted the early day designations and the subject is treated in chapter 167 R. L. 1915 under "Annulment, Divorce, Separation." Section 2926 R. L. 1915 as amended specifies the ground upon which a divorce from the bond of matrimony may be granted and provides that if the party applying for a divorce shall not insist upon a divorce from the bond of matrimony a divorce only from bed and board shall be granted. Separation is dealt with under section 2944 R. L. 1915. It may be here stated that the separation contemplated in the last section quoted is in effect a divorce from bed and board. A decree rendered under that statute is a divorce *a mensa*. The term divorce in its accurate sense denotes dissolution or suspension by law of the marital relation. A separation as contemplated by section 2944 is a divorce in the sense the term is used in section 2930 and that section provides that a cross-libel may be filed in *any action* for divorce. This expression is broad and comprehensive and includes every kind of divorce recognized by the statutes of the Territory.

In *Makahio v. Makahio*, 22 Haw. 425, the libellant John Makahio filed a libel praying for an absolute divorce from his wife. To this, under the provisions of section 2930 R. L. 1915, Mrs. Makahio interposed a cross-libel for separation from the libellant on the grounds (1) excessive and habitual ill treatment; (2) habitual drunkenness, and (3) neglect to provide the necessaries of life. The libellant filed a motion to strike libellee's cross-bill from the files on the ground that the court was without jurisdiction in the proceedings then pending to grant the separation of libellee as prayed for in her said cross-bill. The trial court denied the motion. On appeal to this court, in response to the contention of counsel for Makahio to the effect that a separation cannot be granted to a libellee on a cross-bill to libellant's libel for divorce, the

Opinion of the Court.

court said: "By Act 121 of the Session Laws of 1913 (now section 2930 R. L. 1915) it is provided, however, that 'A cross-libel may be filed in any action for divorce and affirmative relief granted thereon as fully and effectually as in original petitions for divorce.' Under this enactment we are of the opinion that a cross-libel may be filed by the libellee, in an action for divorce, praying for a separation from libellant, and that in a proper case the relief prayed may be awarded to the libellee upon such cross-bill." The converse of this is likewise true. A cross-libel may be filed by a libellee in an action for separation praying for a divorce *a vinculo* from the libellant and a dismissal of the libel would not affect the status of the libellee's cause of action set forth in the cross-libel.

The statute referred to is one of convenience and expediency, its purpose being to afford means by which the marital differences between parties may be adjusted in one proceeding. Hence where one of the parties sets in operation the machinery of the law for the purpose of obtaining a divorce, and without regard to whether the divorce sought be complete dissolution or merely suspension of the marital relations, the other party may interpose a cross-libel and have relief thereon as fully and effectually as in an original petition for a divorce.

The writ is discharged.

Peters & Smith for petitioner.

R. J. O'Brien and Russell & Patterson for respondents.

Syllabus.

A. M. STEWART AND JAMES C. STEWART, CO-PARTNERS DOING BUSINESS UNDER THE FIRM NAME AND STYLE OF JAMES STEWART & COMPANY, *v.* Z. S. SPALDING.

No. 1297.

MOTION TO QUASH WRIT OF ERROR.

SUBMITTED NOVEMBER 9, 1920.

DECIDED NOVEMBER 13, 1920.

COKE, C. J., KEMP AND EDINGS, JJ.

APPEAL AND ERROR.

The requirement in the statute (Sec. 6 of Act 44 S. L. 1919) making it necessary where there is a money judgment that a bond shall be filed in favor of the prevailing party obviously refers to a money judgment in favor of the appellee. Where the only money judgment recovered in the cause is in favor of the plaintiff in error a bond to require the payment of the judgment would serve no useful purpose and no bond is required as a prerequisite to the writ.

Per Curiam. Upon the application of the plaintiff a writ of error was issued out of this court on the 5th day of November, A. D. 1920. On the 9th of November the defendant (defendant in error) by Wm. B. Lymer, Esq., one of his counsel, appeared and moved that the writ of error heretofore issued as aforesaid be quashed for the reason that the plaintiff in error failed to file a bond with the clerk as required by section 6 of Act 44 S. L. 1919. This motion was the outgrowth of the mutual desire of both parties to have the question determined by this court owing to the inapt language of the statute. The motion was submitted without argument. The statute referred to reads as follows:

“No writ of error shall issue until the sum of twenty-five dollars has been deposited to cover costs, and, except

Opinion of the Court.

in criminal cases and cases in which there is no money judgment, a bond has been filed with the clerk, in favor of the prevailing party in the proceeding in which the error is alleged to have occurred, or his personal representatives, conditioned for the payment of the judgment in said original cause in case of failure to obtain the writ of error."

The plaintiff in error brought its action in the circuit court against the defendant in error, the total amount of damages claimed, including interest, being approximately \$90,000. The judgment finally recovered by plaintiff in error was for \$30,824.27 together with costs. Plaintiff in error deeming itself aggrieved by the judgment because of the alleged insufficiency of the amount thereof has come to this court on a writ of error.

The requirement in the statute above quoted making it necessary where there is a money judgment that a bond shall be filed in favor of the prevailing party obviously refers to a money judgment in favor of the appellee. Where as in the case at bar the only money judgment recovered in the cause is in favor of the plaintiff in error a bond to require the payment of the judgment would serve no useful purpose. This is a clear case calling for the application of the rule which requires that the spirit and reason of the statute shall prevail over the strict letter thereof. To make sense out of the statute it must be held that the plaintiff in error is not required to give a bond to pay the judgment standing in its favor as a prerequisite to this writ. See *Kaheana v. Nalimu*, 8 Haw. 227; *Harrison v. Magoon*, 16 Haw. 175.

The motion to quash the writ of error is denied.

W. B. Lymer for the motion.

W. F. Frear and *M. F. Prosser* contra.

Syllabus.

THE SUMITOMO BANK OF HAWAII, LIMITED, v.
HAWAII NOSAN SHOKWAI, LIMITED.

No. 1286.

APPEAL FROM CIRCUIT JUDGE FIRST CIRCUIT.
HON. J. J. BANKS, JUDGE.

ARGUED NOVEMBER 5, 1920.

DECIDED NOVEMBER 22, 1920.

COKE, C. J., KEMP AND EDINGS, JJ.

COMMERCIAL PAPER—*bills of lading*.

The bill of lading represents the goods. It is the symbol of the goods. Its negotiability is that of the goods. Thus in general the transferee of a bill of lading takes the title of the transferor just as the transferee of goods takes the title of the transferor.

SAME—*bills of exchange—transfer by blank indorsement*.

The legal title to a bill of exchange may be transferred by blank indorsement and the holder to whom such bill is transferred has absolute control thereof.

SAME—*same—same*.

The possession of a bill of exchange indorsed in blank to the payee is *prima facie* proof of ownership and sufficient in the absence of other evidence to entitle the holder to recover on proving the indorsement.

OPINION OF THE COURT BY COKE, C. J.

The petitioner-appellant instituted its suit in equity before the circuit court of the first judicial circuit to foreclose a mortgage theretofore executed to it by the respondent-appellee. At the conclusion of the hearing the circuit court rendered its decision dismissing appellant's petition and from this decision and the decree entered thereon the appellant has perfected an appeal to this court. The mortgage contains the following clauses which are of importance in determining the questions now before us:

Opinion of the Court.

"That the mortgagor, in consideration of the sum of one dollar (\$1.00) to it paid by the mortgagee, and further advances made and to be made to the mortgagor by the mortgagee up to an aggregate of ten thousand dollars (\$10,000.00) as needed by the mortgagor, does hereby give, grant," etc., and "if the mortgagor shall well and truly pay all such sums of money, whether evidenced by promissory notes or by open account, not exceeding in all the sum of ten thousand dollars (\$10,000.00) as the mortgagee may have advanced or shall hereafter advance to the said mortgagor, within one year from the date hereof on the security of this mortgage or any subsequent extension thereof, or which may become owing by the mortgagor to the mortgagee, * * * and shall not make any unlawful, improper or offensive use of the premises occupied by said store, or any breach of any covenant or condition herein contained, or by any act or negligence whereby the property hereby conveyed or any part thereof shall become liable to seizure or attachment on any mesne or final process of law, in bankruptcy or otherwise, or whereby the security of these presents shall be impaired, then this mortgage shall be void." The mortgage covered the property of the mortgagor owned by it in connection with its store at the corner of Beretania street and Aala lane, Honolulu. The suit for foreclosure was based on the ground that the mortgagor had allowed the stock in trade covered by the mortgage to run down in value from \$9000 to \$5000 and in its decision the circuit court found this allegation to be true and that the mortgagor had for that reason committed a breach of the mortgage and that such breach would justify a foreclosure if at the time of the institution of the suit there was in fact an enforceable obligation in favor of the mortgagee and against the mortgagor. It was established at the trial that at the time the

Opinion of the Court.

mortgage was executed the mortgagee had in its possession unpaid and past due commercial drafts drawn upon appellee by exporters in Japan who had consigned goods and merchandise to the appellee. These drafts were discounted with and transferred to the Sumitomo Bank, Limited, in Japan, which in turn indorsed the drafts in blank and transmitted the same together with bills of lading, invoices and insurance policies covering the merchandise to the Sumitomo Bank of Hawaii, Limited, the petitioner herein. These foreign bills of exchange or drafts amounted in all to the sum of \$10,611.19. The drafts were duly presented to and accepted by the appellee and the bills of lading, invoices and insurance policies were thereupon turned over to it by the appellant and the goods and merchandise were delivered to the appellee.

The main question involved in this case is whether under the facts above briefly outlined the appellee, the Hawaii Nosan Shokwai, Limited, became obligated to the Sumitomo Bank of Hawaii, Limited, in the amount of the drafts; or in other words, did the transaction create the relation of debtor and creditor between the parties. The court below held that it did not and dismissed appellant's petition. The trial court disposed of the subject in the following language: "Do the drafts themselves create the relation of debtor and creditor between the respondent and the complainant? Most certainly not. The drafts were nothing more than the written demands of the respondent's creditors, namely, the Japanese exporters, that it acknowledge its indebtedness to them, and, upon maturity, pay it. The complainant was merely the agent through which these demands were made. The receipt of the drafts by the complainant for presentation and collection did not substitute it as the creditor of the respondent in the place of those who had sold the goods to the

Opinion of the Court.

respondent, nor did the respondent incur any obligation to the complainant on account thereof. The status of the sellers of the goods and the respondent remained unchanged. Nor did the failure of the respondent to protest the drafts for nonpayment alter the situation. If there was no legal excuse for the respondent's failure to protest the drafts and give proper notice, it probably incurred a liability to those who were damaged through its negligence, but this created no obligation in its favor against the respondent which the law recognizes." We are unable to agree with the principles thus announced. The exporters in Japan consigned goods to the respondent doing business in Honolulu. Drafts covering the value of the goods were drawn upon the consignee. These drafts were transferred to the bank in Japan and by it indorsed in blank to the appellant herein. The drafts were duly presented by the Honolulu bank and were accepted by the appellee. The merchandise was delivered to appellee. The drafts were not protested for the nonpayment thereof. The question then is, the consignee having received the goods, where does its obligation lie? Most certainly it was indebted for the invoice price of the merchandise to some one and it seems clear to us that the bills of lading represented the merchandise and that the consignee's obligation for the merchandise was to the legal holder of the drafts. The local bank by failing to duly protest the drafts for nonpayment rendered itself liable to the bank in Japan. (See Sec. 3602 R. L. 1915.) The bank here delivered the goods to the consignee and thus accepted its credit for the price thereof and of course holds a valid and enforceable claim against the consignee for the purchase price of the goods as represented by the draft. "The bill of lading represents the goods. It is, as is said, the symbol of the goods. Its negotiability is that of the goods. Thus in

Opinion of the Court.

general the transferee of a bill of lading takes the title of the transferor just as the transferee of goods can take only the title of the transferor." 49 L. R. A. (N. S.) p. 645. See also *The Carlos F. Roses*, 177 U. S. 655, 665, and *Dickson v. Merchants Elevator Co.*, 44 Mo. Ap. 498. Under our local statute (Sec. 3501 R. L. 1915) and also by the law merchant as understood and constantly applied the Sumitomo Bank of Hawaii, holding as it did drafts duly indorsed to it in blank and accepted by the drawee, could have maintained an action thereon in its own name. And if it could have done this then the relation of debtor and creditor must necessarily have existed between the parties to this suit at the date of the execution of the mortgage. "The legal title to a bill or note may be transferred by a blank indorsement, and the holder to whom such bill or note is delivered has absolute control thereof. The possession of a promissory note indorsed in blank by the payee is *prima facie* proof of ownership and sufficient in the absence of other evidence to entitle the holder to recover on proving the indorsement." Eaton & Gilbert on Commercial Paper, 327. See also 2 Parsons on Notes and Bills, p. 442. And if the appellant had an enforceable claim against the appellee its right to take security to protect that obligation in the form of the mortgage now in suit cannot be questioned.

It was established by the testimony of Mr. Nakayama, vice-president and manager of the Sumitomo Bank of Hawaii, that the purpose for which the mortgage was given by the appellee was to secure the payment of the foreign bills of exchange in question. This testimony was clear, direct and stands uncontradicted and it must be held to be conclusive notwithstanding it appears to have had little or no weight with the trial court.

The decree appealed from is reversed and the cause is

Syllabus.

remanded to the court below for further proceedings consistent with this opinion.

W. W. Thayer for petitioner.

W. J. Robinson for respondent.

TERRITORY OF HAWAII, BY C. T. BAILEY, COMMISSIONER OF PUBLIC LANDS OF THE TERRITORY OF HAWAII, v. HELEN McH. ROBINSON, ALICE ROBINSON, F. GAY AND FRANCIS GAY, AUBREY ROBINSON, J. R. GAY, ALICE ROBINSON, SINCLAIR ROBINSON AND AYLMER F. ROBINSON, COPARTNERS DOING BUSINESS UNDER THE NAME OF GAY & ROBINSON.

No. 1233.

RESERVED QUESTIONS FROM CIRCUIT COURT FIFTH CIRCUIT.
HON. L. A. DICKEY, JUDGE.

ARGUED OCTOBER 25, 26, 27, 28, 29, 1920.

DECIDED NOVEMBER 24, 1920.

COKE, C. J., KEMP AND EDINGS, JJ.

PUBLIC LANDS—*patent valid on its face—subject to attack in action at law, when.*

A patent issued in due form of law, valid on its face, may be attacked and declared void in an action at law provided the evidence shows it to be void for want of authority for its issue.

SAME—*same—effect of prior grant, reservation from sale or appropriation.*

When the land covered by a patent has been previously granted, reserved from sale or appropriated the patent is void for want of authority for its issue.

Opinion of the Court.

CROWN LANDS—*effect of designating lands as such.*

Designating certain lands as crown lands had the effect of appropriating them and reserving them from sale except by legislative authority.

EJECTMENT—*parties plaintiff.*

In an action in ejectment the fact that the complaining party is the Territory does not affect the general rule that the State is always at liberty to avail itself of all the remedies which the law allows to every person, natural or artificial, for the vindication and assertion of its rights.

OPINION OF THE COURT BY KEMP, J.

This is an action in ejectment by the Territory of Hawaii by C. T. Bailey, commissioner of public lands, against Helen McH. Robinson et al., copartners doing business under the name of Gay & Robinson, to recover a tract of land described in the petition as "situated at Hanapepe, in the district of Kona, Island of Kauai, Territory of Hawaii," setting forth the metes and bounds thereof and excepting therefrom "all that certain piece or parcel of land known as the ili of Koula, more particularly described as follows:" (here follows description of the land excepted by metes and bounds) containing an area of 740 acres. The defendants filed an answer and by leave of court interposed a plea in bar in which it is alleged that the plaintiff is not the owner or, entitled to the possession of the land for the reason that the Kingdom of Hawaii, the predecessor in title of the plaintiff, had released and quit-claimed all its right and interest in the land described in the complaint by royal patent 6998, a copy of which was attached to the plea. The patent attached is dated October 30, 1877, and shows upon its face that it is based upon mahele award No. 55 and was issued to Paniani upon the application of Mrs. Sinclair, "the present occupier of said land." It designates the land as "1/2 Koula situated in the ahupuaa of Hanapepe,

Opinion of the Court.

Island of Kauai" and describes it by metes and bounds, which include the land described in the complaint.

Plaintiff filed a traverse to the plea in bar in which it denies the allegation that the plaintiff is not the true owner or entitled to the possession of the land described in the complaint and in this regard the plaintiff in its traverse to the plea in bar says:

"That the lands described in plaintiff's complaint are situated within the ahupuaa of Hanapepe, which ahupuaa was set apart as a crown land by the legislature of the Kingdom of Hawaii, by the Act of the seventh day of June, A. D. 1848;

"That the fee simple title of said crown lands is in the United States of America, and the Territory of Hawaii is entitled to the use, possession and control thereof;

"And that the said land so described in plaintiff's complaint, with the exception contained in said complaint, has never been legally sold or otherwise disposed of by the Territory of Hawaii or its predecessors in interest."

Plaintiff further sets up in its traverse

"That the royal patent referred to in said plea in bar, to wit, royal patent No. 6998, is void and of no effect, for the reasons, that

"First: Kalakaua had no authority under the law to issue the same, and

"Second: The said patent was issued in contravention of law, and in defiance thereof."

In support of these allegations the plaintiff has set forth a detailed history of the title to the land in question supported by many exhibits. The traverse and the exhibits are very voluminous and will not be set forth in this opinion. As to the exhibits it is sufficient to say that they consist largely of extracts from the mahele book, the records of land grants and the records of the privy council and minister of the interior and are correctly described in said traverse.

Opinion of the Court.

The defendants demurred to the traverse on the ground that the matters and things therein averred are not sufficient in law to constitute a defense to the plea in bar for the following reasons: (1) That a royal patent issued by the Kingdom of Hawaii, valid on its face, can be attacked and set aside or declared void only in equity and not in an action at law; (2) that the said traverse and the matters and things therein averred are a collateral attack and an attempt to declare void in an action at law royal patent 6998, a royal patent issued by the Kingdom of Hawaii, valid on its face, and that the said royal patent cannot be attacked and declared void in this action at law.

Thereupon the circuit court at the request of parties reserved to this court the following questions:

"1. Can a royal patent issued by the Kingdom of Hawaii, valid on its face, be attacked and set aside or declared void in an action at law in the courts of the Territory of Hawaii?

"2. Can Royal Patent No. 6998 be attacked and declared void under the said traverse in the above entitled action?

"3. Are the matters alleged in the traverse sufficient in law to constitute a defense to the said plea in bar?

"4. Should the aforesaid demurrer to the aforesaid traverse be sustained?"

The argument on these questions has taken a very wide range and we do not feel that it is necessary to notice all of it. We think that the traverse sufficiently alleges that the lands described in the patent were at the date of the patent crown lands unless by reason of the particularity with which the facts are set forth on which this allegation is based the plaintiff has destroyed the effect of the general allegation to that effect. Plaintiff says in effect that after the great mahele by which Paniani was given one-half of the ili of Koula and had applied to the land

Opinion of the Court.

commission for an award he also applied to the privy council to purchase the government half of Koula and to settle the commutation which he owed the government in his half and that this arrangement was finally consummated by the government and his heir after his death; that an official survey of said ili was made by the government and a patent (No. 1108) issued to Paniani for the whole of said ili by the field notes officially ascertained by said survey to contain the whole thereof, and that none of the subsequent proceedings could affect or change the rights of the parties.

It is the contention of the defendants that when Paniani received a mahele of one-half of Koula the only right he had was to take his claim before the land commission for an award and that the proceedings before the privy council and the other proceedings based thereon culminating in royal patent No. 1108 to Paniani, relied on by plaintiff, could only have the effect of conveying to Paniani the government's one-half in Koula and could not affect Paniani's one-half interest in said land; that it was a legal impossibility for the said proceedings to have the effect contended for by plaintiff because they say that prior to the act of 1860 for the relief of certain konohikis no one had the authority to grant to Paniani the one-half of Koula maheled to him until he procured an award therefor from the land commission and paid the government commutation thereon.

The plaintiff relies upon section 7 of the Act of November 7, 1846, published in the Revised Laws of 1905 at pages 1243-1245, as authorizing the settlement which it contends Paniani and the government made of their rights in the ili of Koula. Said section is as follows:

“If any konohiki wish to have his portion of any given ili or ahupuaa set off to him according to his rights in the same, that he may procure an allodial title therefor, he

Opinion of the Court.

may petition the Minister of the Interior, on stamped paper, who shall have power, with the approbation of His Majesty in Privy Council, to complete the arrangements for the same, after which there shall be given to the konohiki a patent for the same, in accordance with Act 2, part 1, chapter 7, article 2."

We think it is clear that the statute above quoted conferred upon the minister of the interior with the approval of His Majesty in privy council the authority to settle with a konohiki who had by the great mahele been given an interest in an ili his rights in said land and to issue a patent therefor without the prior action of the land commission thereon. At the option of the konohiki two-thirds of the land given to him by the mahele could be set off to him, he surrendering to the government the other one-third, or he could purchase the government's one-third, usually referred to as paying the government's commutation, and procure a patent for the whole. Where the konohiki was by the mahele given an undivided interest in an ili and the remaining interest was government land as distinguished from crown land the minister of the interior with the approval of His Majesty in privy council could also sell to the konohiki the government's interest and issue a patent therefor. Since the patent in each case would be issued by the same authority we see no reason why the whole ili could not be included in one patent. In either case the land to be patented would have to be surveyed and the description as ascertained by the survey inserted in the patent. If a konohiki who had by the mahele been given an undivided one-half interest in an ili settled the government's commutation in his half and at the same time purchased the government's half and accepted a patent for the whole ili in which the land was described by metes and bounds as ascertained by a survey made for the purpose of carrying out his transaction with

Opinion of the Court.

the government we do not think he could afterwards be heard to say that the description did not embrace the whole of the land. This last is what the plaintiff says in his traverse was done as to the ili of Koula; that is, that Paniani settled the government's commutation in his half and purchased the government's half, the government issuing to him a patent by surveyed description for the whole of said ili. If this is true, and on demurrer the allegations are accepted as true, the whole of the ili of Koula was included in royal patent 1108 and the area and extent of said ili was officially determined by said survey and patent. All of the land within the boundaries of the ahupuaa not included within some ili or kuleana is a part of the ahupuaa and when the boundaries of the ilis and kuleanas within the ahupuaa have been officially and finally determined the remainder of the land within the boundaries of the ahupuaa is part of the ahupuaa regardless of what may have theretofore been claimed as to the ancient boundaries of the lesser tracts within it. As an illustration of what we mean let us consider the ahupuaa of Hanapepe. The out-boundaries of the ahupuaa include lands which admittedly are not part of it. One such tract is the ili of Koula. Now let us suppose that Paniani had been awarded by the land commission the one-half of Koula given to him by the mahele and in order to describe the land included in the award the land commission had caused the ili to be surveyed and a dividing line run between his half and the government half and Paniani accepted the award, that is, did not appeal, can it be doubted that this would have been a final and official determination of what were the ancient boundaries of said ili regardless of what Paniani or kamaaina witnesses might have claimed the ancient boundaries to be? And can it be doubted that under these circumstances land within the ahupuaa and not included within the ili as

Opinion of the Court.

officially described nor within some other ili or kuleana would be a part of the ahupuaa? We think not. Likewise if the minister of the interior with the approval of His Majesty in privy council had, as we have found he did have, the authority to settle with Paniani his rights in the ili of Koula this settlement which plaintiff has set up in its traverse had the same effect, that is, officially determined what the ancient boundaries of Koula were and other land within the boundaries of the ahupuaa would be part of the ahupuaa.

We therefore think that the particulars plead by plaintiff have not destroyed the effect of its general allegation to the effect that the lands in question were at the date of the patent crown lands and since the act of January 3, 1865, the officers executing the patent in question have been without authority to grant crown lands. This brings us then to a consideration of the principles which bear directly upon the questions propounded.

In *Doolan v. Carr*, 125 U. S. 618, which was an action in ejectment in the circuit court of the United States brought by Wm. B. Carr against James Doolan and James McCue to recover possession of 320 acres of land described as the east half of section 27, township 2, range 1 east of the Mount Diablo base and meridian of the public land surveys of the United States of America in the State of California, the plaintiff introduced in evidence a patent from the United States to the Central Pacific Railroad Company for the land in question and a deed from said railroad company to himself. The patent purported to be issued under an act of Congress approved July 1, 1862, as amended by act of July 2, 1864, to aid in the construction of a railroad and telegraph lines from the Missouri river to the Pacific Ocean. The defendant thereupon in order to show that the patent to the railroad company was issued without authority of law and

Opinion of the Court.

therefore void offered evidence to show that the land in question was within the boundaries of an ancient Mexican grant to Jose Noriega and Robert Livermore, said Mexican grant being for "two square leagues, provided that quantity be contained within the said boundaries; and if less than that quantity be found to be contained therein, then that less quantity and all of said described tract of land;" that in 1852 the owners of said grant petitioned the board of land commissioners to have said grant confirmed, and on February 14, 1854, the said board of commissioners confirmed the same to them and their heirs and assigns and the decree of confirmation described the boundaries thereof as in the ancient grant with this proviso: "Provided that within the same no greater quantity than two square leagues were found to be contained; and if a less quantity should be found therein, then that less quantity was confirmed and all of said described tract of land;" that said decree of confirmation was on appeal affirmed by the United States district court for the northern district of California on February 18, 1859, "to the same extent and by the same description, and under the same conditions as said board of land commissioners had done," and the Supreme Court of the United States, at the December term A. D. 1860, affirmed the said decree of the United States district court and every part thereof; that during the year 1865 an official survey of the lands so confirmed was made by or under the direction of the surveyor general of the United States for the State of California which was duly approved by said surveyor general in the year 1866, and which survey included the half section of land described in the complaint; that said survey was set aside by the secretary of the interior in the year 1868 and a new survey ordered by him within the boundaries set forth in said decree "which should contain

Opinion of the Court.

but two square leagues of land or thereabouts;" that in March, 1869, the said surveyor general caused the grant to be again surveyed within the boundaries set forth in said decree of confirmation, the amount so segregated consisting of about two square leagues in accordance with the said order of the secretary of the interior, and said survey was approved by the surveyor general on May 11, 1870, and by the commissioner of the general land office on March 1, 1871, and finally approved by the secretary of the interior on June 6, 1871, and on said last named date the surplus of the land embraced within the boundaries contained in said grant and in said decree became freed and discharged from the claims and reservations of said Mexican grant and became public land of the United States and a part of the public domain thereof; that the entire half section of land described in the complaint is located within the boundaries stated and tract described in and confirmed by said decree of the board of land commissioners of the United States district court and of the Supreme Court of the United States but was not included within the tract surveyed in March, 1869, and finally approved June 6, 1871, as aforesaid, and said half section of land was held and claimed as a part and parcel of said Mexican grant and was reserved as such continually down to the 6th day of June, 1871, and on said last named date it became for the first time public land of the United States. The plaintiff objected to the proof thus offered by the defendant on the ground "that the United States patent cannot be collaterally attacked in this action; that it can be attacked by bill in equity only; that the said United States patent and the recitals therein contained are conclusive evidence in this action that the legal title of the lands therein described was granted and transferred by the United States to the grantee named in said patent, and, taken in connection with the deed from the railroad

Opinion of the Court.

company to the plaintiff, is conclusive evidence of the plaintiff's right to recover." The trial court sustained the objection and refused to allow said proof or any part of it to be made, to which the defendant excepted. The court then charged the jury that "The patent title to this land to the Central Pacific Railroad Company is conclusive in this case. It cannot be attacked in a collateral manner. If it can be attacked at all it is only in a direct proceeding for the purpose of vacating the patent; and, without further remark upon this one way or the other, it may be sufficient to say that I charge you the law is that so far as this case is concerned, the patent from the government to the railroad company, the first patent introduced here, is conclusive of the rights of the parties in this case." To this charge the defendant excepted and the case before the supreme court turned upon the correctness of the ruling of the court on the proposition that in this action at law none of the evidence offered by the defendant could be received to impeach the validity of the patent and that such an issue as that attempted to be raised by the defendant could only be made by a suit in equity to set it aside. In laying down the general principle governing the right to attack a patent issued by the government the court said: "There is no question as to the principle that where the officers of the government have issued a patent in due form of law, which on its face is sufficient to convey the title to the land described in it, such patent is to be treated as valid in actions at law, as distinguished from suits in equity, subject, however, at all times to the inquiry whether such officers had the lawful authority to make a conveyance of the title. But if those officers acted without authority; if the land which they purported to convey had never been within their control, or had been withdrawn from that control at the time they undertook to exercise such authority, then their

Opinion of the Court.

act was void—void for want of power in them to act on the subject-matter of the patent, not merely voidable; in which latter case, if the circumstances justified such a decree, a direct proceeding, with proper averments and evidence, would be required to establish that it was voidable and should therefore be avoided. The distinction is a manifest one although the circumstances that enter into it are not always easily defined. It is, nevertheless, a clear distinction, established by law, and it has been often asserted in this court, that even a patent from the government of the United States, issued with all the forms of law, may be shown to be void by extrinsic evidence, if it be such evidence as by its nature is capable of showing a want of authority for its issue.” The court concluded that: “To the extent of the claim when the grant was for land with specific boundaries, or known by a particular name, and to the extent of the quantity claimed within out-boundaries containing a greater area, they are excluded from the grant to the railroad company. Indeed, this exclusion did not depend upon the validity of the claim asserted, or its final establishment, but upon the fact that there existed a claim of a right under a grant by the Mexican government, which was yet undetermined, and to which therefore the phrase ‘public lands,’ could not attach, and which the statute did not include, although it might be found within the limits prescribed on each side of the road when located.”

It has been repeatedly held by the Supreme Court of the United States that a patent is void which attempts to convey lands that have been “previously granted, reserved from sale or appropriated.” *Wilcox v. McConnel*, 38 U. S. 496; *Stoddard v. Chambers*, 43 U. S. 284; *Reichart v. Felps*, 73 U. S. 160; *Best v. Polk*, 85 U. S. 112; *Burfenning v. Chicago, St. Paul, etc., Ry. Co.*, 163 U. S. 321.

The case of *Wilcox v. McConnel* was an action of

Opinion of the Court.

ejectment brought against Wilcox, the commanding officer at Fort Dearborn, to recover possession of land held by him in that character. This land was entered under a preemption claim by one Beaubean who paid the purchase price and procured the register's receipt therefor. He afterwards sold and conveyed his interest to the lessor of the plaintiff. The question was whether the register's certificate which seems to have been treated as sufficient evidence of title, if it was valid, could be impeached by testimony that the land was not subject to entry. In giving its opinion on this question the supreme court said: "When a court has jurisdiction it has a right to decide every question which occurs in the cause; and whether its decision is correct or otherwise, its judgment until reversed is regarded as binding in every other court. But if it act without authority, its judgment and orders are regarded as nullities. They are not voidable but simply void." The court then proceeded to apply this principle to the case before it in the following language: "Even assuming that the decision of the register and receiver, in the absence of fraud, would be conclusive as to the facts of the applicant then being in possession and his cultivation during the preceding year because these questions are directly submitted to them; yet if they undertake to grant preemptions in land in which the law declares they shall not be granted, then they are acting upon a subject-matter clearly not within their jurisdiction; as much so as if a court whose jurisdiction was declared not to extend beyond a given sum should attempt to take cognizance of a case beyond that sum."

In *Stoddard v. Chambers*, which was an action in ejectment, an attempt was made to show that the defendant's patent was void. The court said in that case: "So it appears that when the defendant's claim was entered, surveyed and patented the land covered by it, so far as

Opinion of the Court.

the location interferes with the plaintiff's survey, was not 'a part of the public land authorized to be sold.' On the above facts the important question arises whether the defendant's title is not void. That this is a question as well examinable at law as in chancery will not be controverted."

In *Polk's Lessee v. Wendell*, 13 U. S. 87, the court, after stating that a court of equity is a tribunal better adapted to the examination of the validity of a patent than a court of law, said: "There are cases in which a grant is absolutely void; as where the State has no title to the thing granted or where the officer had no authority to issue the grant. In such cases the validity of the grant is necessarily examinable at law." In *Patterson v. Winn*, 24 U. S. 380, after citing the case of *Polk's Lessee v. Wendell*, the court said: "We may therefore assume as the settled doctrine of this court that if a patent is absolutely void upon its face or the issuing thereof was without authority or was prohibited by statute, or the State had no title, it may be impeached collaterally in a court of law in an action of ejectment. But in general other objections and defects complained of must be put in issue in a regular course of pleadings on a direct proceeding to avoid the patent."

From the foregoing cases we think it is clear that a patent issued in due form of law, valid on its face, may be attacked and declared void in an action at law provided the evidence shows it to be void for want of authority for its issue and not merely voidable. They further show that if the land covered by the patent has been "previously granted, reserved from sale or appropriated" the patent is void for want of such authority and not merely voidable. That designating certain lands as crown lands would have the effect of appropriating them cannot be doubted. But the defendants assert that even if this

Opinion of the Court.

is the correct rule as applied to cases between individuals the opposite rule should be applied to cases where the government is the complaining party. No direct authority has been cited in support of this contention and we know of none. Counsel for defendants have cited several cases in which the United States government by bills in equity sought to have patents issued by it canceled and assert that they have found no case in which the government ever brought such an action at law. Neither has counsel for plaintiff cited any. We have examined the cases cited by the defendants in which the government sought by proceeding in equity to have its patent canceled and do not think that they can be considered as authority for or against defendants' contention that this case can be maintained, if at all, only in a court of equity. In each of the cases cited the patent sought to be canceled was for lands which the officer issuing the patent had authority to dispose of upon a proper showing by the applicant and the government was assailing the patent on grounds which if established would render the patent voidable and not absolutely void, such as false and fraudulent representations by the applicant as to the character of the land or as to the settlement, improvement and cultivation of a preemption by the applicant, etc. In this case we have the defendants relying upon a patent which is, according to plaintiff's contention, absolutely void for want of authority for its issue and which, if plaintiff's contention is established, conveyed to the grantee named in it no title whatsoever either legal or equitable. When the officers of the government issue a patent to land over which they have no jurisdiction the patent is, according to the many authorities which we have cited, absolutely void and the legal title to the land described in such patent remains in the government. This it seems to us is sufficient to authorize the government to try the issue raised

Opinion of the Court.

in ejectment, although in a case involving a voidable patent the government not having the legal title would be compelled to go into equity to have it canceled.

The general rule is that a State is always at liberty to avail itself of all the remedies which the law allows to every person, natural or artificial, for the vindication and assertion of its rights which includes the right to maintain an action in ejectment when it claims title to land in the possession of another. *Tindal v. Wesley*, 167 U. S. 204, 223; Warvelle on Ejectment, Sec. 173. Neither on principle nor authority can we see any justification for denying the benefit of that rule to the Territory in this case.

We have not discussed the proceedings subsequent to the issuance of patent No. 1108 which are set up in the traverse for the reason that in our opinion they could have no bearing on the question here involved, namely, the right of the plaintiff to maintain this action at law. This is true because if plaintiff is right in its contention that the lands covered by the patent were at the date of the patent set up by defendants crown lands nothing short of legislative action could have authorized their alienation and if plaintiff should fail to establish its contention in that respect the patent is conclusive of all the other questions.

Having concluded that the plaintiff has plead facts which if found to be true would render the patent set up by defendants void and not merely voidable we hold that it is entitled to try that issue at law.

We therefore answer questions numbers 1 and 2 in the affirmative with the limitation that the evidence must show that the patent is void for want of authority for its issue and not merely voidable. Question number 3 is answered in the affirmative and question number 4 in the negative.

Opinion of the Court.

J. Lightfoot, First Deputy Attorney General, for plaintiff.

A. G. M. Robertson and *R. B. Anderson* (*Robertson, Castle & Olson; Frear, Prosser, Anderson & Marx* and *Perry & Matthewman* on the brief) for defendants.

IN THE MATTER OF THE ESTATE OF FREDERICK
MEYER, DECEASED.

No. 1244.

PETITION FOR REHEARING.

FILED NOVEMBER 10, 1920.

DECIDED NOVEMBER 26, 1920.

COKE, C. J., KEMP AND EDINGS, JJ.

Per Curiam. Counsel for appellee have interposed a petition for a rehearing in the above cause. Little need be said in disposing of the petition except to call attention to the misstatements or misinterpretation of the meaning and effect of our former opinion herein.

In paragraph VIII of the petition complaint is made "that this court erred in holding that the selection by the probate judge of the choice of the person first entitled to administer and of the majority of the persons next entitled to administer against the objection of a person of a lower class whose entire interest in the estate is twenty-sevenths, was arbitrary and at the 'whim and caprice' of said judge." This court did not hold or even intimate that the probate judge in the present instance acted either whimsically or capriciously and to read our opinion in that light demonstrates an impoverished under-

Opinion of the Court.

standing of plain and unambiguous language or a purposed distortion thereof. What we did say was that if the rule were as contended for by counsel for appellee then a probate judge might from whim or caprice ignore the statute and the judge's action would be final. This of course was the statement of an extreme case cited obviously for the purpose of illustration.

Again on page 10 of the petition we are reminded "that satisfactory cause can only mean satisfactory to the judge acting in the case and not, as this court seems to think, satisfactory to it." We gave expression to no such thought as imputed to us in the paragraph above. What we held was that the phrase "satisfactory cause," as used in the statute, means that while there is a certain discretionary power vested in the probate judge the discretion thus vested is not personal but is a sound discretion to be regulated and exercised according to the rules of law. It is the kind of discretion which if abused is reviewable on appeal. This rule is neither new nor infrequently applied. We pointed out that many reasons might be shown to exist which would justify the probate judge in departing from the order of priority set forth in the statute. But we further held that in the present case there was no satisfactory cause shown to exist which as a matter of law would justify the probate judge in appointing a stranger to the estate to the exclusion of a son of the deceased and one of the heirs of the estate who desired the appointment and who was shown to be fully qualified to discharge the duties of the trust.

With the views thus expressed all of the members of this court, as well as Circuit Judge Banks who took part in the former opinion, are in full accord.

The petition for rehearing is denied.

H. Holmes and *I. M. Stainback* for the petition.

Syllabus.

BEN HOLLINGER v. JONAH KUMALAE.

No. 1271.

BEN HOLLINGER v. MANUEL C. PACHECO.

No. 1272.

RESERVED QUESTIONS FROM CIRCUIT JUDGE FIRST CIRCUIT.

HON. C. S. FRANKLIN, JUDGE.

ARGUED NOVEMBER 18, 19, 1920.

DECIDED DECEMBER 10, 1920.

COKE, C. J. KEMP AND EDINGS, JJ.

STATUTES—*construction—meaning of language.*

It is a general rule that language used in a statute or constitution must be presumed to have been used in its known and ordinary significance unless that sense be repelled by the context.

SAME—*same—meaning of phrase "office of the Territory of Hawaii."*

In its known and ordinary significance the phrase "office of the Territory of Hawaii" does not include offices purely local or municipal, but includes only such offices as were created for the purpose of carrying on the business of the territorial government.

SAME—*same—disqualification of citizen for election to office.*

Statutes providing for disqualification of citizens for election to office are construed strictly and will not be extended to cases not clearly within their scope.

OFFICERS—*election of officer to another vacates first, when.*

The acceptance of an office by one already holding another, where the holding of the two offices by one person at the same time has been prohibited by law or the two offices are incompatible at common law, automatically vacates the first office held.

SAME—*election of officer to another does not vacate first, when.*

If the law does ^{not} forbid the holding of the two particular offices by one person at the same time and they are not incompatible at common law the acceptance of the second does not vacate the first and the person so elected could legally hold them both at the same time.

SAME—*acceptance by legislator of office of supervisor of City and County of Honolulu, effect of.*

Section 17 of the Organic Act prohibits any person holding

Opinion of the Court.

office "in or under or by authority of the government of * * * the Territory of Hawaii" from holding the position of a member of the legislature while holding said office. Held, that the office of supervisor of the City and County of Honolulu is an office by authority of the government of the Territory of Hawaii and therefore the acceptance of the office of supervisor by a member of the legislature automatically vacated the office of member of the legislature.

OPINION OF THE COURT BY KEMP, J.

Proceedings in quo warranto were instituted in the circuit court by Ben Hollinger to oust the respondents Jonah Kumalae and Manuel C. Pacheco from the office of supervisor of the City and County of Honolulu. Separate proceedings were instituted against each respondent but since the title of each is challenged upon the same grounds both causes were considered together in the circuit court and have by stipulation of parties with the approval of this court been briefed and argued together in this court and will be disposed of in one opinion. So much of the agreed statement of facts in the Kumalae case as is necessary to an understanding of the discussion follows:

"That Jonah Kumalae, respondent above named, was duly elected a member of the house of representatives of the Territory of Hawaii from the fifth representative district on the 5th day of November, 1918, to serve for a period of two years, and duly qualified and took part as a member of said house in the regular session held in Honolulu from February 19, 1919, to April 30, 1919.

"That on the 3rd day of June, 1919, and while still a member of the said house of representatives, said respondent Jonah Kumalae was elected a supervisor of the City and County of Honolulu, to serve for a period of four and a half years from the 1st day of July, 1919, and on said 1st day of July, 1919, undertook and entered upon the duties of said supervisor and has been acting as a supervisor of said City and County since said date.

"That since such election as such supervisor there has been no session of the legislature of the Territory of

Opinion of the Court.

Hawaii, said respondent has not acted as a member of the house of representatives of the Territory of Hawaii, and does not now claim the position of a member of the house of representatives of the Territory of Hawaii."

In the Pacheco case the agreed facts are the same except it is there agreed that he was duly elected a member of the senate of the Territory of Hawaii from the third senatorial district on the 7th day of November, 1916, to serve for a period of four years, and duly qualified and took part as a member of said senate in the regular session held in Honolulu from February 21, 1917, to May 2, 1917, and the special session thereof held in Honolulu from May 14, 1918, to May 31, 1918, and the regular session thereof held from February 19, 1919, to April 30, 1919.

The circuit judge at the request of parties reserved to this court in the Kumalae case the following question:

"Was respondent, on the 3rd day of June, 1919, disqualified for election as a member of the board of supervisors of the City and County of Honolulu by reason of his being a member of the House of Representatives of the Territory of Hawaii?"

In the Pacheco case the same question was reserved with the exception that the word "senate" is substituted for the words "house of representatives."

An answer to the questions reserved requires a consideration of section 16 of the Organic Act of the Territory of Hawaii which reads as follows:

"That no member of the legislature shall, during the term for which he is elected, be appointed or elected to any office of the Territory of Hawaii."

It must be apparent that the question of primary importance for us to determine is whether the office of supervisor of the City and County of Honolulu is an "office of

Opinion of the Court.

the Territory of Hawaii" in the sense in which that phrase is used in the section of the Organic Act just quoted. If it should be determined that such office is an "office of the Territory of Hawaii" it would require no argument to show that respondents were disqualified for election to the office of supervisor and could not now hold such office and our answer to the reserved questions would be in the affirmative. On the other hand if it should be determined that such office is not an "office of the Territory of Hawaii" it would follow that they were not by the terms of said section disqualified for such election and our answer would be in the negative unless there are other provisions of law rendering them disqualified.

Many cases have arisen upon constitutional or statutory provisions employing language somewhat similar to that used in our Organic Act above quoted but we have found none which deals with exactly the language here employed. The nearest approach to the phrase "office of the Territory of Hawaii," used in section 16, to which our attention has been directed, is the phrase "officer of the commonwealth," used in the constitution of Massachusetts, providing that "the senate shall be a court with full authority to hear and determine all impeachments made by the house of representatives against any officer or officers of the commonwealth." And it was there held that the various officers of cities and towns are not officers of the commonwealth in the sense in which that term is used in the constitution. Opinion of the Justices, 167 Mass. 599, 46 N. E. 118. Of course one to be an "officer of the commonwealth" would have to hold an "office of the commonwealth." So the holding is in effect that the various city and town offices are not "offices of the commonwealth." Another near approach to the language used in the Organic Act is found in a Texas statute con-

Opinion of the Court.

ferring authority upon the supreme court of Texas to grant writs of mandamus against certain officers as an original proceeding. The statute provides that the supreme court may issue writs of "mandamus against any district judge or officer of the state government except the governor of the State." When called upon to grant a writ of mandamus against a county treasurer under the statute the court held that the county treasurer is not an officer of the state government and refused to take jurisdiction. *Travis Co. v. Jourdan*, 91 Tex. 217. For a like holding, where the writ was asked against a county judge, see *Turner v. Cotton*, 57 S. W. (Tex.) 35. In *People v. Evans*, 247 Ill. 547, 555, it was held that the members of the miners' examining board are not "state officers," the court saying: "The members of such miners' examining boards are appointed for and perform their duties in the counties wherein they are appointed and have no jurisdiction to act outside of the county in which they are appointed. In general it may be said that a state officer is one whose duties and powers are co-extensive with the state, while a county officer is one whose duties and powers are coextensive with the county (*State v. Burnes*, 38 Fla. 367) and the fact that the official acts of an officer are so far extraterritorial that they are binding throughout the state does not make the officer who performs such acts necessarily a state officer." In *State ex rel Murphy v. Townsend*, 79 S. W. (Ark.) 782, it was held that the office of town recorder though requiring the incumbent to exercise the duties of the mayor in his absence, including duties of a judicial character vested in the mayor by the legislature, is not a state office nor the incumbent a state officer within the meaning of the constitution forbidding any state officer to hold more than one such office at the same time. The court said: "Municipalities are organized by statute under constitutional

Opinion of the Court.

authority, and in case of corporation courts,—mayors' courts, for instance, which are occasionally held by the recorder as we have seen,—the law confers upon them by statute the jurisdiction of justices of the peace. Still this officer is appointed by the municipal authorities and is removable by the same tribunal. He is therefore not a state officer in the sense of the constitutional provisions prohibiting one person to hold two offices at one and the same time."

In *Britton v Steber*, 62 Mo. 370, the opinion turned on the question of the finality of the decision of the appellate court of St. Louis County in a case involving the title to the office of mayor. The supreme court of Missouri has appellate jurisdiction to review the decisions of the appellate court where the title to an office "under the State" is brought in contest. The jurisdiction of the supreme court was invoked to review the decision of the appellate court of St. Louis County in a case involving the title to the office of mayor. In refusing to assume jurisdiction the court said: "There is a recognized distinction between state officers whose duties concern the state at large or the general public, although exercised within defined territorial limits, and municipal officers whose functions relate exclusively to the particular municipality. (Dillon Mun. Corp. Sec. 33.) A state officer may be connected with some of the municipal functions but he must derive his power from a state statute and execute his power in obedience to a state law. (*State v. Valle*, 41 Mo. 29.) Whilst it is true that the state grants the charter under which a city is organized and acts yet those elected in obedience to that charter perform strictly municipal functions and do not act in obedience to state laws in the manner enjoined upon such officers." In *Waldo v. Wallace*, 12 Ind. 569, it is held to be the settled law of that state that the mayor of a city when acting as such is not

Opinion of the Court.

a "state officer" but that when the common council fails to order the election of a city judge, as it is authorized to do under the statute, the mayor is required to hold a city court which has within the limits of the city the jurisdiction and powers of a justice of the peace in all matters, civil and criminal, arising under the laws of the state and for crimes and misdemeanors its jurisdiction is made coextensive with the county in which the city is situated. It was accordingly held that the mayor of a city, the common council of which had failed to order the election of a city judge, was in his capacity as city judge (not as mayor) a judicial officer and therefore ineligible to the office of sheriff under a constitutional provision which provides that "No person elected to any judicial office shall during the term for which he shall have been elected be eligible to any office of trust or profit under the state other than a judicial office."

In *State ex rel Platt v. Kirk*, 44 Ind. 401, the respondent Kirk who held the office of prison director was elected councilman of the city of Madison and qualified and entered upon the discharge of the duties thereof. The general assembly thereupon elected the relator Platt to the position of prison director which it considered the respondent Kirk had vacated by accepting the office of councilman, the state constitution providing "nor shall any person hold more than one lucrative office at the same time." Kirk refused to vacate the office of prison director and the state on the relation of Platt brought proceedings by quo warranto against him to inquire by what right he held that office. The court having held that the clause of the constitution above quoted applied only to lucrative state offices necessarily inquired into the character of the office of councilman; that is, whether it was a state office or otherwise, and upon this question the court held that the office of councilman in a city is an

Opinion of the Court.

office purely and wholly municipal in its character and that such officer has no duties to perform under the general laws of the state; that the board of councilmen have the power to enact by-laws and do such other acts and perform such other duties as pertain to their office in the municipality but that the powers and duties of councilman are beyond and in addition to any acts, powers and duties performed by the officers provided for under the state government. It was therefore held that while the office of councilman in a city is a lucrative office in the ordinary sense of the word it is not a lucrative office within the section of the constitution quoted and the judgment was therefore in favor of the respondent.

In *Santo v. Iowa*, 2 Ia. 164, 220, no such language as we are considering was involved but the decision is nevertheless instructive. The Iowa statute conferred upon the mayor of the City of Keokuk the jurisdiction of a justice of the peace under the criminal laws of the state and made him a justice of the peace in substance although not calling him such in terms. The defendants having been convicted of a criminal offense in the trial before the mayor, acting in his capacity as justice of the peace, on appeal raised the question of the legal authority of the mayor to entertain the cause and challenged the constitutionality of the statute which conferred jurisdiction on the mayor. The objection was that the mayor is an executive officer and that judicial authority is conferred upon him in conflict with that provision of the constitution which says that no person charged with the exercise of power properly belonging to one of these departments—the executive, legislative or judicial—shall exercise any functions appertaining to either of the others. The court held however that the departments referred to in the constitution were the departments of the state government of the state of Iowa and that whatever executive

Opinion of the Court.

offices the mayor may perform pertain to him only as an officer of the city corporation of which he is mayor but exercise none of the functions belonging to a state department; thus in effect holding that the mayor of Keokuk is not a state officer but merely an officer of the corporation.

In *Attorney General ex rel Wilkins v. Connors*, 9 So. 7, it appears that the relator Wilkins was elected sheriff of Escambia County, Florida, in which is situated the city of Pensacola. At the time of his election the statute of that state provided that "it shall be the duty of the sheriff of the county in which such city shall be situated to perform the duties of marshal for such provisional municipality, and to appoint subject to the approval and removal by the board such number of policemen as may be authorized by the board." It further appeared that notwithstanding said provision the respondent had assumed to be, and exercised the powers and duties of, the chief of police force of said provisional municipality and as such exercised powers and duties which appertain to the office of marshal. It was contended for the respondent that the statute above quoted is obnoxious to that provision of the state constitution which provides that "No person shall hold or perform the functions of more than one office under the government of this state at the same time." And in this connection it was urged for the respondent that the city marshal is a state officer in the sense of the constitutional provision invoked and that to put the performance of the duties appertaining to his office upon a sheriff of a county (another state officer) comes within the constitutional inhibition above quoted. The supreme court of Florida, however, held that this inhibition was aimed solely and entirely against offices held under, or whose duties appertained to, the government of the state, and although hold-

Opinion of the Court.

ing the sheriff to be a state officer it was stated that "After careful and exhaustive search we have been unable to find any authority that holds that the government of municipalities forms any part of the government of the state, as such, considered in the broad sense of the term 'state government.' The government of the state, as such, is reared upon and provided for in all of its departments by the constitution, but nowhere in our constitution are the governments of municipalities, or their officials, either created or established as any part of the state government; but their very creation, together with all provisions for 'their government,' are reserved to the legislative branch of the state government, as erected by the constitution. Section 8, art. 8, of the constitution provides that 'the legislature shall have power to establish and to abolish municipalities, to provide for their government, to prescribe their jurisdiction and powers, and to alter or amend the same at any time.' From this provision it will be seen that to the legislature is reserved the power, not only to create, but to abolish, municipal governments. It could hardly be contended that our constitution intended to clothe the legislature with the power to wipe out of existence any part of the great framework of state government; yet such would be the inference were we to hold that the government of the municipalities formed, strictly speaking, any part of the government of the state." The provisions giving the legislature authority to establish municipalities and to provide for their government are very similar to the provisions of section 56 of our Organic Act and what that court has to say as to the effect of those provisions is therefore applicable here.

Other cases of like import could be cited but we do not consider it necessary to do so.

We will now notice the cases relied upon by the peti-

Opinion of the Court.

tioner as establishing his contention that the office of supervisor of the City and County of Honolulu is an office of the Territory of Hawaii. Several Indiana cases are relied upon, the oldest of which is *Creighton v. Piper*, 14 Ind. 182. That was a case in which one Farras who purported to act as supervisor of a road district brought an action against Piper before a justice of the peace to recover a penalty for alleged obstruction of a public road. The statute of Indiana provides that any person who shall unnecessarily and to the hindrance of passengers obstruct any highway shall forfeit the sum of five dollars to be recovered before a justice of the peace in the name of the township trustee by a supervisor of the district. The constitution of Indiana declares that no person shall hold more than one lucrative office at the same time. It was agreed in this case that Farras was duly elected supervisor of the road district and pursuant to his election he was duly qualified and acted as such supervisor and that thereafter he was by the board of commissioners of said county appointed one of the trustees of Harrison township, accepted the appointment, qualified and acted as such trustee and he continued up until the commencement of this suit to exercise the several duties of both supervisor and trustee. It was held that both of these offices were lucrative offices within the meaning of the constitutional provision quoted, no reasons being assigned for the holding. The next Indiana case in point of time is *Howard v. Shoemaker*, 35 Ind. 111, in which it was held that the office of mayor of Jeffersonville, a city incorporated under the general laws, is a lucrative office within the meaning of the same constitutional provision referred to in *Creighton v. Piper, supra*, for the reason that he had duties to perform under the laws of the state for which he could charge and collect fees aside from those which are judicial and those of a purely municipal

Opinion of the Court.

character. If there exists any doubt after reading the decision that this is what controlled the finding of the court in that case we have only to read what the court had to say as to its reason for so holding in the later case of *State ex rel Platt v. Kirk*, which we have already reviewed, and in which it was held that this provision applied only to state offices. At page 406 the court said: "It was held by this court in *Howard v. Shoemaker, supra*, that the office of mayor of a city was a lucrative office within the meaning of the ninth section of article 2 of the constitution, not because he received a compensation for the discharge of such of his duties as were purely municipal in their character but for the reason that he had duties to perform under the laws of the state aside from those which are judicial and those of a purely municipal character, such as the taking and certifying of affidavits and depositions, the proof and acknowledgment of deeds and other instruments in writing for which he is entitled to and may charge and receive fees." The next Indiana case which we shall notice is that of *Chambers v. The State ex rel Bernard*, 127 Ind. 365. This was an action brought by the state on the relation of Bernard, prosecuting attorney, against Chambers to oust him from the office of school trustee of the school town of Newcastle and have the office declared vacant on the ground that after Chambers' election and qualification as such school trustee he was appointed, accepted and qualified as trustee for the institute for the education of the deaf and dumb. The court reviewed all the Indiana decisions to which we have referred and reaffirmed all of them, holding that the office of trustee of the institute for the education of the deaf and dumb and the office of school trustee are both lucrative offices within the meaning of the constitutional provision referred to, basing its decision upon the same grounds as are set forth in the earlier decision, namely.

Opinion of the Court.

that they have duties to perform under the general laws of the state.

In California it is held that the office of school superintendent of a county and the office of supervisor of a county come within the meaning of the phrase "civil office of profit under this State," used in the article of the state constitution which provides that "No person holding any lucrative office under the United States or any other power shall be eligible to any civil office of profit under this State" (*Crawford v. Dunbar*, 52 Cal. 36; *People v. Leonard*, 73 Cal. 230), but in neither case is there any pretense of a discussion of the question here involved. In fact the question does not appear to have been raised and the court apparently assumed, rather than held, that they were offices "under the State." It is also held in *Satterwhite v. Garrison*, 34 Cal. App. 734, that a deputy district attorney is the holder of an "office, trust or employment under this State," though generally known as a county officer, under a constitutional provision providing that no member of the legislature shall during the term for which he shall have been elected hold or accept any office, trust or employment under the State. This was held on the authority of the two California cases above cited and the court added: "We think these cases are not overruled by *Nicholl v. Koster*, 157 Cal. 416 (108 Pac. 302), which holds that probation officers are not 'officers of the state government,' the term 'officers of the state government' being evidently much more restricted and of narrower import than the clause of the constitution now under consideration."

In Pennsylvania it is held that the holding of the office of postmaster and county commissioner by one person at the same time is prohibited by the constitution of the state by the provision that "No member of Congress from this State nor any person holding or exercising any office

Opinion of the Court.

or appointment of trust or profit under the United States shall at the same time hold or exercise any office in this State to which a salary, fees or perquisites shall be attached." *DeTurk v. Commonwealth*, 129 Pa. 151. The constitutional provision above quoted is utterly unlike the provision found in our Organic Act and this decision is therefore of no value although the court did in the course of its opinion in the discussion of the question of whether the acceptance of one office vacated the other say: "In considering this question regard must be had to the fact that the former (postmaster) is an office under the government of the United States and the latter (county commissioner) an office under the state government."

In *State v. Moores*, 52 Neb. 770, it was held that the office of mayor of a metropolitan city in that state is an "office under the state." The following quotation from page 779 of the opinion in this case will suffice to show the holding of the court and the reasons therefor: "But the contention of respondent, if we correctly understand his counsel, is that the constitutional provision invoked by relator embraces merely state officers or 'offices under the state.' To so construe the fundamental law is to ignore not only the grammatical construction of the language used by the framers, but as well the plain and ordinary signification of the words. The duties of such officer are not merely municipal, but the law creating the position has imposed upon him many duties and functions which pertain to state affairs, and the enforcement of the general laws of the commonwealth, many instances of which are pointed out on page 10 of relator's brief, such as the mayor is made conservator of the peace, has the power to issue a *posse comitatus*, to order the suppression of riots and breaches of the peace, to remit fines and costs imposed by the police judge for offenses arising under the laws of the state, and, in cases of urgency or

Opinion of the Court.

necessity, to exercise the functions of an examining or committing magistrate. Such powers derived from a positive state statute, although also clothed with municipal functions, constitute the office of mayor of a metropolitan city an office under the state."

In *Truitt v. Collins*, 122 Md. 526, it is held that the holding of the office of supervisor of elections and the office of town councilman by one person at the same time is prohibited by article 55 of the declaration of rights which declares: "That no person shall hold at the same time more than one office of profit created by the constitution and laws of this State," etc. In that case it was contended that the position of town councilman is not an "office" within the meaning and intent of the above quoted article of the declaration of rights, but the court held that because the incumbent is required before entering upon his duties to take an oath of office the position is an "office," and further held that because the duties and the nature and extent of the powers of such councilman are conferred by law such office of councilman is an "office of profit" within the meaning of the article of the declaration of rights above quoted—that is, an "office of profit created by the constitution and laws of this State." Again we may say that the constitutional provision under consideration in that case is so utterly unlike the provision here under consideration as to render the decision without value to us. The Maryland case does not decide anything except that the office of councilman is an "office" and that it is "created" under the constitution and laws of the state.

Probably the best considered opinion relied upon by the petitioner is that in *Attorney General v. Detroit Common Council*, 112 Mich. 145. The constitution of Michigan provides that "No member of Congress nor any person holding office under the United States or this State

Opinion of the Court.

shall execute the office of Governor.” The mayor of Detroit was elected to, accepted and entered upon the execution of the duties of the office of governor. He continued to perform the functions of both offices. The attorney general of the state brought a mandamus proceeding against the common council of the city of Detroit to compel it to call an election to fill a vacancy in the office of mayor. The petition proceeded upon the theory that by accepting the latter office that of mayor had become vacant and a writ of mandamus was asked to compel the respondent to call an election to fill such vacancy. The petitioner’s theory was upheld and the writ ordered, the court holding that the mayor of Detroit came within the constitutional description of officers “holding office under the State.” To this extent, if “office under the State” is equivalent to “office of the State,” and nothing else appeared to differentiate this case from that and the other cases, it might be considered as supporting the petitioner’s view in this case. But we think the cases may be differentiated on two grounds. First in order to support the holding that the office of mayor of Detroit comes within the constitutional description of officers holding “office under the State” and the holder thereof therefore prohibited from executing the office of governor the court pointed out that the mayor had under the Michigan statute many state duties to perform, such as conserving the peace, requiring persons to give security to keep the peace, conducting examination of persons charged with crime and committing them to jail or requiring a recognizance for appearance at the circuit court for trial; to admit persons charged with crime to bail; to issue proclamations requiring saloons to be closed upon election days; to call upon the commanding officer for aid from state troops in case of riot, breach of the peace, tumults or violent resistance of any

Opinion of the Court.

process of the state, etc., and held that an officer of a city whose duties are simply and purely municipal and who has no function pertaining to state affairs does not come within the constitutional description of officers "holding office under the state" but that officers of cities who are appointed or elected by the community in obedience to laws of the state which impose duties upon them in relation to state affairs as contradistinguished from affairs of interest to the city merely are upon a different footing and may properly be said to hold "office under the state."

Does the office of supervisor of the City and County of Honolulu come within this principle? The answer must be found in an examination of the charter of the City and County wherein the powers and duties of the supervisors are defined. Section 1654 R. L. 1915 and the various amendments thereof, consisting of twenty-seven separate paragraphs, contain the legislative grant of powers to, and the imposition of duties upon, the supervisors, and from a careful reading of this section as well as other sections of the charter we fail to find where they are vested with any powers of a general territorial nature or are given any territorial duties to perform. On the contrary it appears to us that every official act of the supervisors is of purely local application. They are charged with no such duties as those found by the Michigan case or the other cases reviewed to be state duties. Hence the basis of these decisions is lacking in this case. Then too, there is a marked difference between the term "office under the state" contained in the Michigan constitution, and the term "office of the Territory" contained in section 16 of our Organic Act. The term "office under the State" is a much more comprehensive term than "office of the Territory" and one might well be held to come within the description holding an office "under the State" and at the same time be held not to come within the

Opinion of the Court.

description of an "office of the State." This distinction is recognized by the California court in *Satterwhite v. Garrison, supra*, from which we quoted.

It must be apparent that the cases cited are not necessarily conclusive of the question before us which involves language somewhat different from the language construed by the various courts in these cases though we think that on the authority of the adjudicated cases alone we would be compelled to hold that the office of supervisor of the City and County of Honolulu is not an "office of the Territory of Hawaii."

It will be noted that not all of the cases considered were dealing with the question of eligibility to be elected to or hold an office but we think that none of them dealt with a constitutional or statutory provision which would require a stricter construction than the act involved in this case. It is a general rule that language used in a statute or constitution must be presumed to have been used in its known and ordinary significance unless that sense be repelled by the context. *Levy v. McCartee*, 31 U. S. 102, 110. Another well recognized rule is that statutes providing for disqualification of citizens for election to office are construed strictly and will not be extended to cases not clearly within their scope. 29 Cyc. 1380.

Unquestionably in its known and ordinary significance the phrase "office of the Territory of Hawaii" does not include offices purely local or municipal, but includes only such offices as were created for the purpose of carrying on the business of the territorial government. Unless, therefore, there is something in the context showing that Congress intended a different meaning we must hold that it intended the words used to be accepted in their known and ordinary significance. By the context is meant not only the sentence or section in which the words occur but

Opinion of the Court.

the whole body of the act. From an examination of the act in question it clearly appears that Congress was addressing itself to the task of providing a territorial form of government for the newly acquired Hawaiian Islands and did not go into the question of municipal government except to confer upon the territorial legislature by section 56 of the act the authority to "create counties and town and city municipalities within the Territory of Hawaii and to provide for the government thereof" and by an amendment enacted in 1905 provided that "all officials thereof shall be appointed or elected as the case may be in such manner as shall be provided by the governor and legislature of the Territory." From a view of the act as a whole we do not think there is anything to indicate that Congress intended the words "office of the Territory of Hawaii" to have any meaning other than their known and general meaning. From a closer view of some of the provisions of the Organic Act directly in connection with section 16 we think may be found confirmation of this view. Section 17 of the Organic Act provides: "That no person holding office in or under or by authority of the Government of the United States or of the Territory of Hawaii shall be eligible to election to the legislature, or to hold the position of a member of the same while holding said office." The language of this section is much more comprehensive in the description of those who shall be ineligible to election to the legislature and a holding that the incumbent of a municipal office is ineligible for election to the legislature under this provision would not imply that a member of the legislature is disqualified during the term for which he was elected for election to a municipal office.

Neither do we find any merit in petitioner's argument that because the general laws of Congress (Sec. 1854 U. S. R. S.), applicable to all territories then in existence,

Opinion of the Court.

provided that "No member of the legislative assembly of any Territory now organized shall hold or be appointed to any office which has been created or the salary or emoluments of which have been increased while he was a member, during the term for which he was elected and for one year after the expiration of such term" Congress must be presumed to have had in mind the prevention of the same mischief aimed at in this section and that since the legislature of which respondents were members increased the salary of supervisors of the City and County of Honolulu the section under consideration should be so construed as to prevent that mischief. It seems to us that this circumstance has the opposite effect from that contended for. By section 5 of the Organic Act it is provided that sections 1850 to 1890 U. S. R. S. shall not apply to the Territory of Hawaii and if Congress had intended the same effect it would undoubtedly have extended the general law to Hawaii or have used similar language to that used in the general law.

We think it is clear that Congress did not intend by section 16 to prescribe who should not be appointed or elected to any office purely municipal but by section 56 of the Organic Act left that to the territorial legislature. The territorial legislature evidently took that view of it and has by section 1667 R. L. 1915 prescribed what qualifications will make one eligible to fill any elective office created by the municipal charter of the City and County of Honolulu and have prescribed different qualifications from those required of officers of the Territory by the Organic Act, notably the provision to the effect that one must have been a duly qualified elector of the Territory and City and County for at least two years, while a member of the senate or house of representatives must have resided for at least three years in the Territory and be qualified to vote for representative in his district.

Opinion of the Court.

Sections 34 and 40 Organic Act. Other territorial officers are merely required to be citizens of the United States and of the Territory of Hawaii, the latter of which is acquired by one year's residence in the Territory.

Section 1668 R. L. 1915 provides that "No person shall hold more than one office at the same time except as herein provided" and petitioner's counsel contend that this section is violated and respondents cannot hold the office of supervisor. In this contention they overlook entirely the rule that by the acceptance of the second office (that of supervisor) the first (that of legislator) was automatically vacated providing the holding of the two offices by one person at the same time has been forbidden by law or the two offices are incompatible at common law. *Howard v. Harrington*, 114 Me. 443, 96 Atl. 769; 1917A L. R. A. 211 and note p. 225. The only exception to this rule is where the two offices held are under different governments, in which case inasmuch as the second government has no power to declare the office held under the first government vacant and is powerless to prevent the officer from exercising the office first held, it must content itself with refusing to permit him to have the office it does control. This has been applied in cases where one office was under a state government and the other under the Federal government.

It is likewise true that if the law does not forbid the holding of the two particular offices by one person at the same time for the reason that one is municipal and the other territorial and they are not incompatible at common law respondents could legally hold them both at the same time. But we are not left to a determination of the scope of section 1668 R. L. to ascertain that respondents are prohibited by law from holding the office of senator and representative while holding the office of supervisor, for section 17 of the Organic Act prohibits any person hold-

Opinion of the Court.

if no advances were made the decree appealed from should have been affirmed.

It becomes important therefore to determine whether there was a showing by petitioner on this phase of the case which entitled it to recover.

The use of the word "advances" in contracts has been in many cases construed but the word has no such meaning that the court can determine the sense in which it is used by the parties without examining the contract as an entirety and seeking the aid of the surrounding circumstances and the practical construction of the contract by the parties themselves. 2 C. J. 33. There is nothing in the context which throws any light on the question but the surrounding circumstances insofar as they were permitted to be shown are illuminating. The witnesses for petitioner have testified in effect that prior to the execution of the mortgage and as the reason why the very mortgage in question was demanded the respondent was told that it must secure the petitioner in respect to the various drafts then held by petitioner, some of which were then past due and others of which would soon become due and that in accordance with this demand the mortgage was given for that purpose. The respondent has not been heard on this question but the testimony of petitioner's witnesses is clear and specific. Unless upon a further trial of the case the evidence should show that the petitioner's evidence is unreliable it could not be said that the parties themselves did not select the language used in the mortgage for the purpose of describing the obligations the payment of which the witnesses say the mortgage was meant to secure. If the parties so understood the language the court will not resort to a technical construction in order to ascribe to it a different meaning.

We think that the petitioner made a *prima facie* showing of its right to recover but of course this does not mean

Syllabus.

that the respondent may not yet be entitled to a decree if by any legal evidence the case made by the petitioner is overcome.

The petition for a rehearing is denied.

W. J. Robinson and *E. J. Botts* for the petition.

ISHII TSURU *v.* C. BAYER AND HAWAIIAN SUGAR
COMPANY, LIMITED.

No. 1252.

EXCEPTIONS FROM CIRCUIT COURT FIFTH CIRCUIT.

HON. C. S. FRANKLIN, JUDGE.

SUBMITTED NOVEMBER 26, 1920.

DECIDED DECEMBER 18, 1920.

COKE, C. J. KEMP AND EDINGS, JJ.

TROVER AND CONVERSION—*demand when necessary.*

In actions of trover the general rule recognized by all of the authorities is that where the original taking is lawful and there has been no illegal assumption of ownership or illegal user a demand and refusal must be shown as evidence of a disposition to convert to the holder's own use or to divest the true owner of his property.

SAME—*demand when not necessary.*

Where the taking itself is wrongful or where there is an illegal assumption of ownership or an illegal user a demand and refusal need not be proved.

SAME—*conversion defined.*

Any distinct act of dominion wrongfully exerted over one's property in denial of his right or inconsistent with it is a conversion.

SAME—*trover and replevin distinguished.*

In the common law action of trover the plaintiff seeks solely the recovery of damages for the conversion of his property and the action is thus distinguishable from an action of replevin in which the primary relief sought is recovery of the specific prop-

Opinion of the Court.

erty in question though by statute damages based on the value of the property, if its return cannot be obtained, may be recovered.

SAME—*effect of return or offer to return property.*

As a general rule an offer to return property wrongfully converted is not admissible even in mitigation of damages, but where the conversion is technical, inadvertent or the result of a mistake and the property is still in *status quo* an offer to return it may be shown in mitigation of damages.

SAME—*measure of damages.*

In this class of cases the measure of damages ordinarily would be the fair reasonable value of the property at the time of the conversion. If the plaintiff has accepted the return of the property this would not bar an action for conversion but would mitigate the damages and fix the measure thereof at the reasonable value of the property at the time of the conversion less its value when returned.

OPINION OF THE COURT BY COKE, C. J.

This is an action for damages for the alleged conversion by the defendants of certain personal property owned by the plaintiff. The action was instituted in the circuit court of the fifth judicial circuit, trial being had before a jury, and at the conclusion of the introduction of the evidence and on motion of the defendants the court directed a verdict for the defendants and the plaintiff now brings the case up on a bill of exceptions.

The principal ground relied upon in the bill of exceptions and the only question necessary to be considered here challenges the propriety of the action of the trial court in directing a verdict for the defendants. From the record it appears that the plaintiff Ishii Tsuru was engaged in conducting a Japanese boarding-house at Makaweli, Island of ~~Kauai~~ Kauai, in buildings owned by the Hawaiian Sugar Company Limited, one of the defendants. On or about the day of August, 1919, the plaintiff suddenly departed the Island of Kauai, proceeding directly to Honolulu where she remained for about three weeks. The morning

Opinion of the Court.

following the departure of plaintiff the plantation policeman discovered that the buildings formerly occupied by plaintiff were unoccupied, that the doors thereof were unlocked and the furniture and personal effects therein were liable to be damaged or stolen by trespassers. He thereupon locked the doors and fastened the windows but upon a return to the premises within a short time he found that some of the personal effects therein had been removed. Upon reporting this fact to Mr. C. Bayer, manager of the Hawaiian Sugar Company's store at Makaweli, and under his direction, all of the personal property of the plaintiff was removed and stored in the company's warehouse. Within a few days thereafter Mr. Bayer ordered a large portion of the property, consisting of personal clothing and household goods and effects of the plaintiff, sold. This property was disposed of at private sale to various persons and was delivered to and removed by the purchasers. The money received for the goods was put aside for the plaintiff. Some ten days or two weeks subsequently to the sale of the property the plaintiff returned to Kauai and thereupon the defendants, apparently recognizing their error, had all of the property which had been sold as aforesaid returned by the purchasers thereof and again placed in the company's warehouse. The plaintiff without demand upon the defendants instituted this suit. The court below held that the action could not be maintained because no demand had been made for the return of the property and it was upon this ground principally that the order directing a verdict in favor of the defendants was based.

In actions of trover the general rule recognized by all the authorities is that where the original taking is lawful and there has been no illegal assumption of ownership or illegal user a demand and refusal must be shown as evidence of a disposition to convert to the holder.

Opinion of the Court.

erty in question though by statute damages based on the value of the property, if its return cannot be obtained, may be recovered.

SAME—*effect of return or offer to return property.*

As a general rule an offer to return property wrongfully converted is not admissible even in mitigation of damages, but where the conversion is technical, inadvertent or the result of a mistake and the property is still in *status quo* an offer to return it may be shown in mitigation of damages.

SAME—*measure of damages.*

In this class of cases the measure of damages ordinarily would be the fair reasonable value of the property at the time of the conversion. If the plaintiff has accepted the return of the property this would not bar an action for conversion but would mitigate the damages and fix the measure thereof at the reasonable value of the property at the time of the conversion less its value when returned.

OPINION OF THE COURT BY COKE, C. J.

This is an action for damages for the alleged conversion by the defendants of certain personal property owned by the plaintiff. The action was instituted in the circuit court of the fifth judicial circuit, trial being had before a jury, and at the conclusion of the introduction of the evidence and on motion of the defendants the court directed a verdict for the defendants and the plaintiff now brings the case up on a bill of exceptions.

The principal ground relied upon in the bill of exceptions and the only question necessary to be considered here challenges the propriety of the action of the trial court in directing a verdict for the defendants. From the record it appears that the plaintiff Ishii Tsuru was engaged in conducting a Japanese boarding-house at Makaweli, Island of Kauai, in buildings owned by the Hawaiian Sugar Company, Limited, one of the defendants. On or about the 19th day of August, 1919, the plaintiff suddenly departed from the Island of Kauai, proceeding directly to Honolulu where she remained for about three weeks. The morning

Opinion of the Court.

following the departure of plaintiff the plantation policeman discovered that the buildings formerly occupied by plaintiff were unoccupied, that the doors thereof were unlocked and the furniture and personal effects therein were liable to be damaged or stolen by trespassers. He thereupon locked the doors and fastened the windows but upon a return to the premises within a short time he found that some of the personal effects therein had been removed. Upon reporting this fact to Mr. C. Bayer, manager of the Hawaiian Sugar Company's store at Makaweli, and under his direction, all of the personal property of the plaintiff was removed and stored in the company's warehouse. Within a few days thereafter Mr. Bayer ordered a large portion of the property, consisting of personal clothing and household goods and effects of the plaintiff, sold. This property was disposed of at private sale to various persons and was delivered to and removed by the purchasers. The money received for the goods was put aside for the plaintiff. Some ten days or two weeks subsequently to the sale of the property the plaintiff returned to Kauai and thereupon the defendants, apparently recognizing their error, had all of the property which had been sold as aforesaid returned by the purchasers thereof and again placed in the company's warehouse. The plaintiff without demand upon the defendants instituted this suit. The court below held that the action could not be maintained because no demand had been made for the return of the property and it was upon this ground principally that the order directing a verdict in favor of the defendants was based.

In actions of trover the general rule recognized by all the authorities is that where the original taking is lawful and there has been no illegal assumption of ownership or illegal user a demand and refusal must be shown as evidence of a disposition to convert to the holder's own

Opinion of the Court.

use or to divest the true owner of his property. But where the taking itself is wrongful or there is an illegal assumption of ownership or an illegal user a demand and refusal need not be proved. *Ah Hoy v. Raymond*, 19 Haw. 568, 573. "Any distinct act of dominion wrongfully exerted over one's property in denial of his right, or inconsistent with it, is a conversion. * * * While therefore it is a conversion where one takes the plaintiff's property and sells or otherwise disposes of it, it is equally a conversion if he takes it for a temporary purpose only, if in disregard of the plaintiff's right. Therefore, if one hire a horse to go to one place, and drive him to another, this is a conversion, though he return him to the owner. The word 'conversion' by a long course of practice has acquired a technical meaning. It means detaining goods so as to deprive the person entitled to the possession of his dominion over them. Any asportation of a chattel for the use of a defendant or a third person amounts to a conversion, for this simple reason: that it is an act inconsistent with the general right of dominion which the owner of the chattel has in it, who is entitled to the use of it at all times and in all places." Cooley on Torts (3d ed.) pp. 859, 860, 861. Acts of conversion have been classified as follows: "(1) A taking from the owner without his consent; (2) an unwarranted assumption of ownership; (3) an illegal use or abuse of the chattel; and (4) a wrongful detention after demand." 38 Cyc. p. 2009. "An action for conversion without a prior demand and refusal is justified by a transfer of property by one having no right or title thereto, irrespective of the character of his possession." 38 Cyc. p. 2036. The injury which is redressed in an action of trover is technically called conversion. Trover is the name of the action which lay at common law for the recovery of damages for the conversion of personal property, and the gist of the action

Opinion of the Court.

is the disposing or assuming to dispose of another's goods without his authority. Conversion is any distinct act of dominion wrongfully exerted over another's personal property in denial of or inconsistent with his rights therein, such as a tortious taking of another's chattels, or any wrongful exercise or assumption of authority, personally or by procurement, over another's goods, depriving him of the possession permanently or for an indefinite time. The act must be essentially tortious, but it is not essential to conversion sufficient to support the action of trover that the defendant should have the complete man-cupation of the property, or that he apply the property to his own use, if he has exercised dominion over it in exclusion of, in defiance of, or inconsistent with the owner's right. In the common law action of trover the plaintiff seeks solely the recovery of damages for the conversion of his property and the action is thus distinguishable from an action of replevin in which the primary relief sought is the recovery of the specific property in question, though by statute damages based on the value of the property, if its return cannot be obtained, may be recovered. "When an actual conversion of goods has taken place the owner is generally under no obligation to receive them back upon a tender by the wrongdoer, and even though the tender be accepted by the owner this is generally regarded as no bar to the action." 26 R. C. L. 1113. "It is well settled that there is a conversion for which trover will lie where there has been an unlawful sale of the property of another by one who assumes to be the owner, or acting for the owner, or by one who acts on behalf of a person other than the owner." 26 R. C. L. 1119. The purpose of proving a demand by the plaintiff, and a refusal by the defendant, to deliver the property in an action of trover is to show a conversion and it is the generally accepted rule that such demand and refusal are

Opinion of the Court.

unnecessary if the act of the defendant is tortious and amounts to a conversion regardless of whether a demand is made. If the act of the defendant falls short of amounting to a conversion a demand is necessary before suit can be maintained, but "Any act of dominion wrongfully exerted over property in denial of the owner's right or inconsistent with it amounts to a conversion." *McPheters v. Page*, 83 Me. 234. "Conversion may be proved by demand and refusal of possession but evidence of this is not necessary if there is other evidence of actual conversion." *Brandenburg v. N. W. Jobbers Credit Bureau*, 128 Minn. 411. "Demand and refusal are never necessary as evidence of conversion except when the other acts of the defendant are not sufficient to prove it; nor are they evidence of it when, as in this case, it was not in the power of the defendant to deliver the property when demanded. Besides, after property has been converted a delivery of it to the owner on demand by him will not bar or defeat an action for conversion but will only mitigate damages." *Gilmore v. Newton*, 85 Am. Dec. 749. We have quoted at length from the authorities to the end that the rule as well as the reasons therefor may clearly appear.

There is some evidence in this case which indicates that the defendants in the first instance assumed that the property had been abandoned by the plaintiff. This, however, is denied by the plaintiff. Of course if the plaintiff did in fact abandon the property the status of the case might be altered, but whether or not there was an abandonment, the evidence thereof being conflicting, was a question for the jury under proper instructions of the court.

Counsel for appellees have cited a number of authorities applying the rule in respect to property which has been pledged or pawned. These authorities we think have no application to the question now before us. The de-

Opinion of the Court.

fendants in this case by selling the property of the plaintiff to third persons exercised dominion over it inconsistent with the rights of the plaintiff and thus wrongfully converted the same and hence no demand was required as a preliminary to the right to maintain her action in trover.

We think that under the circumstances of this case as divulged by the record the original taking of the property by the defendants was rightful and proper, but clearly the subsequent sale of the property was unauthorized and amounted to a tortious conversion of it and that thereupon a cause of action for damages immediately accrued to the plaintiff and no subsequent act of the defendants other than the payment of the damages sustained could defeat the action.

While it does not appear from the record before us that defendants returned or offered to return the property to plaintiff it may be said that where a party wrongfully converts the property of another it is not put in his power by merely restoring the property to the owner to escape liability for the tort committed. As a general rule an offer to return property wrongfully converted is not admissible even in mitigation of damages, but where the conversion is technical, inadvertent or the result of a mistake and the property is still in *status quo* an offer to return it may be shown in mitigation of damages. *McGraw v. Sampliner*, 107 Mich. 141; *Plummer v. Reeves*, 102 S. W. 376. And see *Gilbert & Miller v. Peck*, 43 Mo. Ap. 577, where the rule is fully discussed and the authorities reviewed. In this class of cases the measure of damages ordinarily would be the fair reasonable value of the property at the time of the conversion. If the plaintiff has accepted an offer to return the property and has assumed control of it this would not bar an action for conversion but would mitigate the damages and fix the measure

Opinion of the Court.

thereof at the reasonable value of the property at the time of the conversion less its value when returned. *Eldridge v. Hoefer*, 45 Ore. 239.

In this case we think it not unlikely that the court below confused the law of replevin with the law applicable to a case of conversion.

Where the wrongful conversion of the property of another has once been shown no demand is necessary to sustain an action therefor and to hold otherwise would be to rewrite the law of conversion and to depart entirely from a fundamental rule recognized and applied by every authority dealing with the subject.

The verdict and judgment herein are set aside and the cause is remanded to the court below for a new trial.

E. K. Aiu and *A. G. Kaulukou* for plaintiff.

W. O. Smith and *L. J. Warren* for defendants.

LEE CHEW TAI *v.* TOM CHOY.

No. 1295.

APPEAL FROM DISTRICT MAGISTRATE OF MAKAWAO.

DECIDED DECEMBER 21, 1920.

COKE, C. J. KEMP AND EDINGS, JJ.

Per Curiam: The record in this cause discloses an attempt to perfect an appeal on points of law from certain rulings of the district magistrate for the district of Makawao, County of Maui. The purported notice of appeal is not signed by the appellant nor by any one in his behalf, hence there is no notice of appeal, and under the rule laid down in *Territory of Hawaii v. Aki*, 15 Haw. 63, the appeal is dismissed of our own motion.

Syllabus.

DUKE P. KAHANAMOKU v. ADVERTISER PUBLISHING COMPANY, LIMITED, AN HAWAIIAN CORPORATION.

No. 1277.

EXCEPTIONS FROM CIRCUIT COURT FIRST CIRCUIT.

ARGUED DECEMBER 7, 8, 1920.

DECIDED DECEMBER 22, 1920.

COKE, C. J. KEMP AND EDINGS, JJ.

LIBEL AND SLANDER—*pleading—falsity of publication need not be alleged.*

It is not necessary for the plaintiff in a civil action for libel to allege the falsity of the libelous publication, but if the defendant desires to justify the publication by showing it to be true that comes in as a defense under a proper pleading in his behalf.

SAME—*same—special damages when not necessary.*

If the publication complained of is libelous *per se* special damages need not be alleged or proven but general and punitive damages may be recovered.

SAME—*publication libelous per se when.*

If the language used of and concerning the plaintiff (when construed to mean what persons of ordinary intelligence reading it would reasonably understand it to mean) would tend to render him contemptible or ridiculous in public estimation or expose him to public hatred or contempt it is libelous *per se*.

SAME—*same.*

To publish of a person that he has not a sufficient job because he is a loafer or a slacker is libelous *per se* as such a charge tends to subject the person charged to social degradation and to the contempt of all right thinking people.

OPINION OF THE COURT BY KEMP, J.

The plaintiff Duke P. Kahanamoku instituted this action for libel against the Advertiser Publishing Company, Limited. The defendant interposed a demurrer to the complaint which was by the circuit court overruled

Opinion of the Court.

and the matter is here on an interlocutory bill of exceptions to the order overruling the demurrer. The essential part of the complaint follows:

"2. That plaintiff above named, Duke P. Kahana-moku, was at all times hereinafter mentioned and now is, a resident of Honolulu aforesaid, a citizen of the United States of America and of the Territory of Hawaii. That plaintiff was at all times hereinafter mentioned and now is an amateur athlete, a member of the Amateur Athletic Union of America, generally known as the A. A. U., a swimmer of great renown and widely known throughout the Territory of Hawaii and among the people thereof. That plaintiff was at all times hereinafter mentioned and now is widely known and of great renown as an athlete and swimmer throughout the United States of America, the Territory of Hawaii, Australia, New Zealand, in Europe and elsewhere. That plaintiff is the holder of many records, including world's records for swimming and did compete in the Olympic Games as a representative of the United States of America in the year 1912, with great success.

"3. That at Honolulu, aforesaid, on the 29th day of October, 1919, the defendant, said Advertiser Publishing Company, Limited, viciously and maliciously and for the purpose of injuring the reputation, character, fame and good name of the plaintiff herein, and for the purpose of bringing said plaintiff into disgrace, abhorrence, odium, hatred, contempt and/or ridicule, among the people of the Territory of Hawaii, the United States of America, and the people elsewhere, and for the purpose of causing said plaintiff to be excluded from the society of said peoples, and with the intent wickedly, viciously and maliciously to injure said plaintiff personally in his good name, fame, reputation and character, as a swimmer, amateur athlete and otherwise, did publish or cause or procure to be published in 'The Pacific Commercial Advertiser' aforesaid, of and concerning said plaintiff personally, as a swimmer, as an amateur athlete and otherwise, certain libelous and defamatory words, matters and things as follows:

Opinion of the Court.

“ ‘DUKE P. KAHANAMOKU QUILTS COLD.

‘ONE TIME IDOL AND WORLD’S
CHAMPION OUT OF SWIM MEET.

‘The Duke has quit cold. (Meaning and intending thereby the said plaintiff, Duke P. Kahanamoku, and that said Duke P. Kahanamoku had quit cold, and was and is a quitter, a coward and a poor sport.)

‘Faced with the stiffest competition in the world in a swimming meet which has attracted attention wherever swimming is popular, he has refused to enter the Fall Swimming Meet after Norman Ross, ‘Stubby’ Kruger, George and Frances Cowles Schroth have been brought thousands of miles to meet the local talent in what promises to be one of the finest aquatic carnivals held in the Islands.

‘The man who has received local and even world-wide adulation, pages of publicity and many honors, whose picture is featured on the Hawaii Tourist Bureau booklets and letterheads, has pleaded muscles hardened from rowing that prevent his being at top standard.

‘Duke Kahanamoku is a swimmer. He has received his honors for swimming. He knew the Fall Swimming Meet was planned long before the regatta. He knew that he would be expected to lead the representatives of Hawaii in the carnival. He went into rowing and now he is not willing to stand the gaff. (Meaning and intending thereby the said plaintiff, Duke P. Kahanamoku, and that said plaintiff was and is a coward and a quitter and a poor sport and afraid of competition and not willing to stand the gaff and not willing to stand competition.)

‘VISITORS GOOD SPORTS.

‘The visiting swimmers have shown themselves good sports. They have entered generously so that the public can see them swim in many races. The local swimmers, except Duke, are doing their parts. He sulks in his tent and talks about muscles. What he needs is backbone. (Meaning and intending thereby the said plaintiff, Duke P. Kahanamoku, and that said plaintiff was and is a poor sport and was and is a coward without backbone, a quitter and not willing or able to stand competition.)

Opinion of the Court.

'The sporting editor of this paper was approached by members of the swimming committee and asked whether he would protect the Duke in case the latter was a good sport and entered, despite the muscles. The reply was that, if it were shown that the Duke was really handicapped by 'rowing muscles' or was in poor condition, this paper would be glad to recognize his sportsmanship, say in advance that he was in the condition which he was proven to be in, and in case of his defeat, call attention again to the facts, without detracting from the work of the winner.

'But that was evidently not enough for the Duke, if the committee reported it to him. He did not prove to be so much of a sport, so the truth is now clear. (Meaning and intending thereby the said plaintiff, Duke P. Kahana-moku, and that said plaintiff was and is a poor sport, a coward, a quitter, a man without backbone, and unable and unwilling to stand competition.)

'WOULD HIDE FACTS.

'When it became known that the Advertiser meant to tell the public the facts about the failure of Duke to enter the coming meet, some of the committee members pleaded that it would hurt the sport.

'To them the Advertiser replies that for Hawaii not to repudiate Duke's action will hurt the sporting reputation of the Islands far more. The quitting of Duke will be heralded far and wide in the press. The wireless will carry it to the mainland papers and correspondents will write of it. The swimmers will take back the word. Our whole program intended to make the Crossroads of the Pacific the swimming capital of the world, will fall like a pack of cards when it is known that our swimming idol has feet of clay and that we are too blind to see it. (Meaning and intending thereby the said plaintiff, Duke P. Kahanamoku, and that said plaintiff has cold feet or feet of clay, and that said plaintiff was and is a quitter, a coward, a person without backbone, a poor sport, and unable and unwilling to stand competition.)

'We owe it to our swimming guests to show them that

Opinion of the Court.

their sportsmanship is recognized and that we demand no less of our own.

‘Some of the committee say that Hawaii has done very little for the Duke. Since when has it become the thing that the world owes an amateur athlete a living for his sport? If it does, the structure of amateur sport falls in ruin. After the present denouement who will have the hardihood to say that Hawaii owes the Duke anything?’

‘A SILLY EXCUSE OFFERED.

‘Others of the committee excuse the Duke’s failure to come across with a clean cut action, and his lack of a sufficient job by saying that he ‘is a Hawaiian.’

‘The Advertiser protests in the name of the Hawaiian people, whose members are self-supporting and many of whom are well-to-do. The race has too much self-respect to let a slur like that go unchallenged. The Hawaiian people will be among the last to back up a slacker or a loafer, whoever he may be. (Meaning and intending thereby the said plaintiff, Duke P. Kahanamoku, and that said plaintiff was and is a slacker, a loafer, unworthy to be a person of Hawaiian blood and Hawaiian descent, a coward, a man without backbone, a poor sport, a quitter and a person unwilling and unable to stand competition.)

‘The Duke has had his chance and he has passed it up. The chance of his being sent to the Olympics in 1920 is gone and Hawaii will be ready to welcome some new swimming idol who is worthy to represent her in the water. (Meaning and intending thereby the said plaintiff, Duke P. Kahanamoku, and that said plaintiff was and is a slacker, a loafer, unworthy to be a person of Hawaiian blood and Hawaiian descent, a coward, a man without backbone, a poor sport, a quitter and a person unwilling and unable to stand competition, and generally of such low character as to be unworthy to represent the Territory of Hawaii as a swimmer and amateur athlete.)’

“That said defendant, Advertiser Publishing Company, Limited, by the aforesaid libelous article, words, matters and things, did maliciously, viciously and wickedly mean and intend to charge said plaintiff, Duke P.

Opinion of the Court.

Kahanamoku, and did charge said plaintiff thereby falsely, with being a quitter, a coward, a poor sport, a person afraid of competition and not willing or able to stand competition, a person without backbone, a person with cold feet or feet of clay, a slacker, a loafer, an Hawaiian unworthy to be of Hawaiian blood and Hawaiian descent and a person unworthy to represent the Territory of Hawaii as a swimmer and amateur athlete. That said libelous article, words, matters and things aforesaid, were published and printed or caused or procured to be published and printed as aforesaid, upon page 6 of 'The Pacific Commercial Advertiser' aforesaid, which said page is known as the Sporting page of said newspaper, of and concerning the said plaintiff, his character, person and reputation as an amateur athlete, a citizen of the Territory of Hawaii, an Hawaiian and otherwise. That said libelous article, words, matters and things aforesaid, were circulated throughout the Territory of Hawaii and elsewhere by said defendant corporation, for the same purpose and with the same intent as the same were published, printed or caused or procured to be published and printed in said newspaper by said defendant corporation as aforesaid.

"4. That said libelous article, words, matters and things as published and printed or caused or procured to be published and printed and circulated by the said defendant corporation as aforesaid, were published, printed and circulated by said defendant corporation maliciously and without legal or any cause or excuse, and such words, matters and things wherein and whereby in said libelous article and publication, said plaintiff is charged and accused with being a quitter, a coward, a poor sport, a person afraid of competition and not willing or able to stand competition, a person without backbone, a person with cold feet or feet of clay, a slacker, a loafer, an Hawaiian unworthy to be of Hawaiian blood and Hawaiian descent and a person unworthy to represent the Territory of Hawaii as a swimmer and amateur athlete, were and are absolutely false and untrue.

Opinion of the Court.

"5. That by reason of said false, malicious and libelous publications so published as aforesaid, and circulated as aforesaid, by said defendant corporation, said plaintiff has suffered great injury to his fame, reputation and good name, and has been brought into disgrace, abhorrence, odium, hatred, contempt and/or ridicule and has been excluded from the society of divers persons in the Territory of Hawaii and elsewhere, and has suffered great grief and mental anxiety, and has been deprived of much sound sleep and has lost much valuable time, and has been otherwise greatly injured and damaged. That said plaintiff has been damaged and has suffered damage as aforesaid in the sum of Thirty Thousand Dollars (\$30,000.00). Plaintiff further claims the sum of Twenty Thousand Dollars (\$20,000.00) as and for punitive damages against said defendant corporation."

The grounds of the demurrer on which defendant relies are as follows:

"1. That said complaint fails to set forth facts sufficient to constitute a cause of action in this:

"(a) That the alleged publication in 'The Pacific Commercial Advertiser' of October 29, 1919, is not libelous;

"(b) It nowhere appears in and by said complaint that the plaintiff was specially or at all damaged by the publication of the alleged libelous article.

"2. That said complaint fails to disclose any facts upon which might be predicated the claim for punitive damages."

The demurrer as presented in the circuit court contained other grounds but they have not been insisted upon here. We have examined them, however, and find them without merit.

Under the grounds of the demurrer above set out and which the defendant insists are well taken it is argued that the article in question does not exceed the bounds of "fair criticism or comment," that it is not libelous *per se* and that plaintiff having failed to allege special damages there is no basis for a claim for punitive damages.

Opinion of the Court.

The demurrer of course admits the truth of every allegation of fact contained in the complaint but defendant's counsel contend that because of the peculiar allegation of falsity contained in the complaint the facts stated in the article, as distinguished from what they term comment and expression of opinion upon the facts, are admitted to be true and invoke the rule that comment upon admitted facts cannot constitute libel. This contention is based on the assumption that a complaint which fails to allege the falsity of the publication is demurrable and on this assumption much of defendant's argument is predicated.

Without deciding whether plaintiff has alleged the falsity of all or only a part of the article of which he complains we think that there is no ground for holding that he has admitted the truth of any part thereof. In the proofs at the trial the plaintiff is not called upon to show the falsity of the article or any part of it, but if defendant desires to justify the publication by showing it to be true that comes in as a defense under a proper pleading in his behalf. This being true the averment of falsity should not be required and whatever the rule may be elsewhere it was held by this court as early as 1884 in *Waterhouse v. Spreckels*, 5 Haw. 246, that it is not necessary for the plaintiff to allege the falsity of the libelous article. So far as we are aware this holding has never been overruled and we think it is sound in principle, for if plaintiff is not required to prove the falsity we see no reason why he should be required to allege it. We are not unmindful of the fact that at common law it was usual and probably necessary to allege the falsity of the libelous publication, but in adopting the common law here we did not adopt such of it as had theretofore been rejected by Hawaiian decisions. To the contrary such Hawaiian decisions were given the force of a statute. *The Schooner Robert Lewers v. Kekauoha*, 114 Fed. 849.

Opinion of the Court.

In order to determine the question raised by the demurrer it is only necessary to decide whether the publication complained of is libelous *per se*. If it is injury to the plaintiff will be presumed and special damages need not be alleged or proven, but general and punitive damages may be recovered. Whereas, if it is not libelous *per se*, the plaintiff must allege and prove special damages or his action will fail.

Plaintiff has alleged malice and it is his contention that special damages have been alleged but in this he is in error. The damages alleged are of a most general character. It is therefore necessary in order to sustain the pleading to hold that the publication is libelous *per se*.

Before entering upon an examination of the publication for the purpose of determining this question it will be well to get as clear an idea as possible of what the test is. Defendant cites and relies upon the case of *Nichols v. Daily Reporter Co.*, 30 Utah 74, 83 Pac. 573, where it is said that the correct test of a publication is "where the language used concerning a person or his affairs from its nature necessarily must, or presumably will, as its natural and proximate consequence occasion him pecuniary loss, its publication is libelous *per se*."

Cooley in the third edition of his work on Torts at pages 376, 377, in giving a test for determining whether spoken words are slanderous so as to be actionable *per se* said:

"Certain publications are said to be actionable *per se*. By this is meant that an action will lie for making them without proof of actual injury, because their necessary or natural and proximate consequence would be to cause injury to the person of whom they are spoken, and therefore injury is to be presumed. In the case of certain other publications no such presumption can be made, because observation does not justify a like conclusion.

Opinion of the Court.

Therefore, in such cases, the publications are only actionable on averment and proof that injury which the law can notice actually followed as a natural and proximate consequence. * * * In the recent case of *Pollard v. Lyon*, spoken words as a cause of action, are classified by Mr. Justice Clifford as follows: '1. Words falsely spoken of a person which impute to the party the commission of some criminal offense involving moral turpitude, for which the party, if the charge is true, may be indicted and punished. 2. Words falsely spoken of a person which impute that the party is infected with some contagious disease, where if the charge is true, it would exclude the party from society. 3. Defamatory words falsely spoken of a person, which impute to the party unfitness to perform the duties of an office or employment of profit, or the want of integrity in the discharge of the duties of such an office or employment. 4. Defamatory words falsely spoken of a party which prejudice such party in his or her profession or trade. 5. Defamatory words falsely spoken of a person which, though not in themselves actionable, occasion the party special damage.' The first four of these classes are of words actionable *per se*. The fifth embraces cases which are actionable only when the special damage is averred."

At pages 400-402 of the same work, where the test for determining whether a printed statement is libelous *per se* is given, it is said:

"In libel, as in slander, defamatory publications are classified as publications actionable *per se*, and publications actionable on averment and proof of special damage. In the first class are embraced all cases of publications which would be actionable *per se* if made orally. These cases, therefore, require no further attention. It also embraces all other cases where the additional gravity imparted to the charge by the publication can fairly be supposed to make it damaging. Thus, to say of a man: 'I look upon him as a rascal,' is not slander, unless shown to be damaging; but if it be published of him in one of the public journals, the presumption that injury follows is reasonable and legitimate. So, to call a man in print

Opinion of the Court.

'an imp of the devil and cowardly snail,' is libelous, though an oral imputation of the sort would be presumably harmless. So, to charge a teacher with falsehood in a report made to the official board, and with general untruthfulness, is libelous *per se*. The general rule is stated thus: Any false and malicious writing published of another is libelous *per se*, when the tendency is to render him contemptible or ridiculous in public estimation, or expose him to public hatred or contempt, or hinder virtuous men from associating with him. 'The nature of the charge,' it is said in one case 'must be such the court can legally presume (the plaintiff) has been degraded in the estimation of his acquaintances, or of the public, or has suffered some other loss, either in his property, character, or business, or in his domestic or social relations in consequence of the publication.' Any words that tend to lower the plaintiff in the estimation of his friends or in the common estimation of citizens, or that tend to injure his social character or status, or to destroy the confidence of his neighbors in his integrity, are libelous *per se*."

And again at pages 408-410 the author says:

"If the words alleged to have been used, whether written or spoken, are not actionable *per se*, or if they do not refer to the plaintiff, or if they are ambiguous, or if their defamatory meaning depends upon a local or provincial use of a word or words, or for any reason they require explanation by some extrinsic matter to make them actionable, such extrinsic facts must be alleged by way of inducement, both in order to show that the words are defamatory and to render the charge intelligible and certain. If the language is not actionable on its face and no extraneous facts are alleged, the action must fail. It is immaterial how the imputation is conveyed, whether by a direct charge, or by insinuation, or by means of some hidden or covert meaning in the words. Even the truth may be so stated as to imply a criminal charge and render the author liable. In one case it is said: 'In order to constitute a libel it is not necessary that the language should in express terms charge a crime. The charge may be made by insinuation. If the language of the publication be calculated to induce those who read it to

Opinion of the Court.

believe that the person of whom it is written is guilty of a crime, it is sufficient to support an action. The words of a publication might be literally true, yet if the sense of the publication is to impute a crime, it will be deemed libelous. Language is often more significant in suggestion than in expression. Truth half told is frequently more hurtful than blatant falsehood; it is not less venomous, and is more insidious. In determining whether the words charged are libelous *per se*, they are to be taken in their plain and natural import according to the ideas they are calculated to convey to those to whom they are addressed, reference being had not only to the words themselves, but also to the circumstances under which they were used. They should receive a fair and reasonable construction, and will be presumed to have been used in the ordinary import attached to them in the community in which they were uttered or published. 'In determining whether a given publication is libelous, the language thereof must be taken in its ordinary signification, and construed in the light of what might reasonably have been understood therefrom by the persons who read it. The question is, how would persons of ordinary intelligence understand the language.' In interpreting the language, it is not a question of the intent of the speaker or author, or even of the understanding of the plaintiff, but of the understanding of those to whom the words are addressed, and of the natural and probable effect of the words upon them. It is no defense that no harm was intended or that the words were used in jest. A person is presumed to intend the natural consequence of his acts and defamation consists solely in the effect produced upon the minds of third parties."

These extracts from Cooley constitute such a clear and comprehensive statement of the test to be applied to publications in general as to render it unnecessary for us to do more than deduce therefrom the test to be applied in such a case as this.

Libels affecting the character of private persons are classified according to their objects: (1) Libels which

Opinion of the Court.

impute to a person the commission of a crime. (2) Libels which have a tendency to injure him in his office, profession, calling or trade. (3) Libels which hold him up to scorn and ridicule and to feelings of contempt or execration, impair him in the enjoyment of society and injure those imperfect rights of friendly intercourse and mutual benevolence which man has with respect to man. Newell, Slander and Libel (3d ed.) p. 72.

It is clear that the libel in this case is of the third class and whatever may be the test of the other classes it is necessarily true that the test laid down in the Utah case, *supra*, in so far as it requires a "pecuniary" loss to be apparent is not the correct test of a libel of this class.

Again turning to Cooley we see that if the language used (when construed to mean what persons of ordinary intelligence reading it would reasonably understand it to mean) would tend to render him contemptible or ridiculous in public estimation or expose him to public hatred or contempt or hinder virtuous men from associating with him it is libelous *per se*.

What then is the tendency of the language used of and concerning the plaintiff in this case?

In his decision on the demurrer the circuit judge said:

"In his argument the defendant's attorney very ingeniously picked the alleged libel to pieces in an attempt to show that nothing was said which would hold the plaintiff up to scorn and ridicule. But such is not the proper method of determining the character of a newspaper article. An alleged libel must be considered as a whole. Its character can only be ascertained by recourse to the article as a whole, to the tone of the article as a whole and to the sense in which it was intended as gathered from the context and from all the facts and circumstances under which it was used. Learned author above quoted has very tersely set forth the law on the subject. 'A word

Opinion of the Court.

at the end may alter the whole meaning. So if in one part appears something to the plaintiff's discredit, in another something to his credit, the 'bane' and the 'antidote' should be taken together. The law does not dwell on isolated passages, but judges of the publication as a whole.' "

This is undoubtedly the rule where the whole article relates to one subject for all that is said on the subject must be considered in order to determine the sense in which the article would naturally be understood by those reading it. But where one part of the article is upon a subject wholly foreign to the other we think that very little if any aid is to be had from an attempt to consider them together.

By way of illustrating what we have in mind we point out that the principal topic of discussion in the article is the failure of plaintiff to enter the fall swimming meet and comparing his sportsmanship with the sportsmanship of other local swimmers and the visiting swimmers. When all that is said on this subject is considered together we fail to find anything defamatory of plaintiff. The article itself shows, and we think the average reader would see, what conduct of plaintiff the writer had in mind as justifying his conclusion that plaintiff "quit cold;" that he "did not prove to be so much of a sport;" that he "has feet of clay," and "needs back bone," and that was his failure to enter the swimming meet after the visiting swimmers had been brought thousands of miles with the expectation of meeting him. We think that the average reader knows that there was no obligation, either moral or legal, resting upon plaintiff to enter even though he had received "world wide adulation, pages of publicity and many honors" as a swimmer and the average reader would therefore see from the article itself the ridiculousness of the writer's conclusion. Unquestionably plaintiff had the right to stay out of the

Opinion of the Court.

swimming whatever his excuse or even without excuse, and the publication is nothing more than a hostile comment upon the manner in which he exercised this right. To accuse one of being deficient in some quality which neither the law nor good morals requires of him as a good citizen is not libelous *per se*. *Urban v. Helmick*, 45 Pac. (Wash.) 747.

But there is another portion of this publication which we think has a decided tendency to subject the plaintiff to ridicule and contempt. We refer to the discussion under the head "A silly excuse offered." We think that the reader of ordinary intelligence reading this portion of the article would understand that some of the committee had stated to the writer or the writer had stated to the committee that the plaintiff has not a sufficient job, that is, a job by which he earns his living, or words to that effect, and that some of the committee said this was due to the fact that he is a Hawaiian, whereupon the writer protests in the name of the Hawaiian people, not against the statement that plaintiff has not a sufficient job, as counsel for defendant would have us believe, but against the reason assigned by some of the committee as to why he has not a sufficient job, by saying that the Hawaiian people will be the last to back up a loafer or a slacker. He does not make the charge in direct language that the plaintiff is without a sufficient job because he is a loafer or a slacker, but we submit that the language used is capable of no other meaning. The charge may be made by insinuations. *Cooley on Torts* 409. The publication therefore charges the plaintiff with being without a sufficient job and ascribes as a reason therefor that he is a loafer or a slacker. To thus charge him is to impute to him the characteristics of a loafer or a slacker. A loafer, as defined by Webster and as generally understood, is "One who loafs; a lazy lounge; one who has

Opinion of the Court.

the bad habits typical of street loafers." The term "slacker" is too new to be defined by any present authority but in American life it has a well established meaning known to every one of ordinary intelligence. The term came into use during the recent world war and was most generally applied to a person who unlawfully evaded, or attempted to evade, his military duty. The term, however, is sometimes used to convey another meaning very similar to the meaning of the term "loafer," especially when used in connection with other language which shows that the evasion of one's ordinary moral or civil duties, instead of military duty, was in mind.

We think, however, that in this enlightened age it is libelous *per se* to charge one with being a "loafer" for when we consider what the term implies we are impelled to the conclusion that such a charge tends to subject the person charged to social degradation and to the contempt of all right thinking people. It is therefore immaterial in which sense the term "slacker" was used or would be understood except that in the first sense more odium would be cast upon the person to whom it was applied. That changes in the social state may be considered in determining whether a certain charge is libelous *per se* was held, and we think correctly, in *Gomez v. Haw'n Gazette Co.*, 10 Haw. 108, 111.

The language last considered justified the circuit court in overruling the demurrer. The exception should therefore be, and is, overruled.

C. S. Davis (*Brown, Cristy & Davis* on the brief) for plaintiff.

A. G. Smith (*Peters & Smith* on the brief) for defendant.

DE FREITAS *v.* DE FREITAS, 25 Haw. 717. 717

Syllabus.

FRANCISCO DE FREITAS *v.* ISABELLA DE FREITAS, AS ADMINISTRATRIX OF THE ESTATE OF JOE DE FREITAS.

No. 1293.

EXCEPTIONS FROM CIRCUIT COURT FIFTH CIRCUIT.

HON. L. A. DICKEY, JUDGE.

SUBMITTED DECEMBER 21, 1920.

DECIDED DECEMBER 23, 1920.

COKE, C. J. KEMP AND EDINGS, JJ.

APPEAL AND ERROR—*exceptions—rejected evidence—record.*

This court will not consider an exception to the sustaining of an objection to a question when the record does not disclose any offer to show what the answer would be and that the answer would be material and competent evidence.

SAME—*same.*

An exception which does not bring to the attention of this court some specific question of law which was presented to the lower court is too general to be considered by this court.

OPINION OF THE COURT BY KEMP, J.

This action of replevin to recover five head of cattle or their value, alleged to be one hundred ninety dollars (\$190), was commenced in the district court of Lihue, County of Kauai. Judgment was had in favor of the defendant and the plaintiff appealed to the circuit court of the fifth circuit, where a trial was had jury waived, and the defendant again prevailed. The matter is here on exceptions eight in number, six of which relate to the exclusion of evidence offered by the defendant, one to the decision and one to the judgment.

All of the exceptions relating to the exclusion of evidence come clearly within the rule announced in *Yim Fat v. Gleason*, 24 Haw. 210, to the effect that this court will not consider an exception to the action of the trial court

Opinion of the Court.

in sustaining an objection to a question asked a witness when the record does not disclose any offer to show what the answer will be and that the answer would be material and competent evidence. None of the exceptions discloses what answer was expected to any of the questions the answers to which were excluded upon objection. We cannot presume that the answers would have been material or in favor of defendant in the absence of a showing as to what the answers would be. The exceptions to the exclusion of evidence must therefore be overruled.

The remaining exceptions are as follows:

Exception No. 7. Thereafter a decision in writing was filed in said cause finding for the defendant, to which decision the plaintiff excepted and the exception was allowed.

Exception No. 8. Thereafter final judgment was filed in the cause, adjudging in favor of the defendant, to which judgment the plaintiff excepted, and the exception was allowed.

These exceptions clearly come within the ruling in *Ripley & Davis v. Kapiolani Est.*, 22 Haw. 507, to the effect that exceptions must be sufficiently definite and specific to call to the attention of this court a point of law which was called to the attention of the trial court affecting the legality of its ruling thus giving the lower court the opportunity to correct its ruling if erroneous.

The exceptions before us are not sufficiently definite to call to our attention any point of law which was called to the attention of the circuit court affecting the legality of its ruling.

The exceptions should therefore be and they are overruled.

E. K. Aiu for plaintiff.

P. L. Rice for defendant.

Syllabus.

SUMNER S. PAXSON *v.* SCHUMAN CARRIAGE
COMPANY, LIMITED, AND GUSTAVE
SCHUMAN.

No. 1234.

EXCEPTIONS FROM CIRCUIT COURT FIRST CIRCUIT.

ARGUED DECEMBER 28, 1920.

DECIDED JANUARY 17, 1921.

COKE, C. J., KEMP AND EDINGS, JJ.

REPLEVIN—evidence—possession.

When it appears that from the time plaintiff claims to have acquired title to the property in controversy from the defendant, he has had possession of said property, it is proper to show the attitude of both himself and the defendants toward that possession.

SAME—parties defendant—joinder of principal and agent.

An agent or servant of a corporation may be joined with the corporation in replevin even though all that he did in the way of taking and detaining the property was merely as the agent and servant of the corporation.

TRIAL—verdict—correction of errors.

Where the jury attempts to return a verdict for an amount greater than is justified by the undisputed evidence it is proper for the court to refuse to receive the verdict and instruct the jury to retire and correct its verdict so as to conform to the uncontradicted evidence to which he calls its attention.

OPINION OF THE COURT BY KEMP, J.

Sumner S. Paxson commenced this action of replevin in the circuit court against Schuman Carriage Company, Limited, and Gustave Schuman for the restitution of "that certain Hudson automobile registered under the provisions of ordinances numbers eleven and seventy-one of the City and County of Honolulu and the amendments thereto, as automobile number 3055, which said automobile is of the value of \$2000.00," or in the alternative in

Opinion of the Court.

case restitution cannot be had, for damages in the sum of \$2000. The defendants filed a joint answer in which they deny each and every, and all and singular the allegations in plaintiff's complaint contained. Trial was had before a jury which resulted in a verdict in favor of plaintiff against both defendants for the restitution of the automobile in question or in the event restitution cannot be had for the sum of \$1400, and the defendants come to this court on exceptions.

A brief statement of the controversy as disclosed by the evidence will help to understand the questions raised by the exceptions. The plaintiff was from 1913 to February 1918 vice-president and manager or assistant manager of the defendant company and the defendant Gustave Schuman was president, principal stockholder and general manager of the defendant company. The defendant company is and has been for several years an Hawaiian corporation engaged principally in the business of buying and selling new and used automobiles. In the early part of 1917 the defendant company acquired title to the automobile in question in a badly wrecked condition from J. A. Kennedy by taking it as part payment for a new one. As to the above facts there does not appear to be any controversy except possibly as to the relation of the plaintiff to the defendant company it not being altogether clear as to whether he was manager of the company's business or only assistant manager thereof. It is clear, however, that whatever his position his authority was subordinate to that of the defendant Gustave Schuman. The plaintiff claims that he acquired title to said wrecked automobile from the defendant company immediately following the acquisition of it by said company by virtue of an oral agreement between himself and said Gustave Schuman acting for the defendant company, by the terms of which plaintiff was to take over

Opinion of the Court.

the automobile in its wrecked condition, repair it at his own expense and thereafter use it in the business instead of using, as had been his practice, cars new and used owned by the company and kept for sale. The plaintiff detailed the transaction between himself and Mr. Schuman by which he claims to have acquired the title and Mr. Schuman denied that any such transaction took place. In February 1918 the defendant company, acting through the defendant Gustave Schuman, discharged the plaintiff, seized the automobile in question, locked it up and has since retained possession of it. After demand made upon both defendants for its delivery plaintiff commenced this suit.

The plaintiff was permitted over the objection of defendants to prove various acts of himself and others toward the automobile in question for the purpose of corroborating his claim of ownership and many of the exceptions now urged relate to the ruling of the court in permitting such proof. For instance, the plaintiff was permitted to show that the defendant company did not include this automobile in its inventory of property on hand December 31, 1917; that plaintiff had it registered under the City and County ordinances and the taxes paid in his own name for the years 1917 and 1918; that the defendant company had a dealer's number under the City and County ordinance which was for use on stock cars and not used on this car; that plaintiff's wife used the car for her private business or pleasure quite often both during business hours and at other times as well as many other facts which would tend to show that plaintiff was using the car as would the owner and to show that all these acts were within the knowledge of Mr. Schuman the president and general manager of the defendant company.

Counsel for defendants has cited *Rawley v. Brown*, 71 N. Y. 85, in support of his contention that evidence of

Opinion of the Court.

possession by plaintiff and his wife was inadmissible. The argument is that the use of the automobile in their social and business duties could not have vested the title or right to possession thereof in plaintiff and that the evidence tended to confuse and cloud the issues. The case cited holds that possession of property alone and without explanation is evidence of ownership but is the lowest species of evidence and liable to be overcome by evidence showing the character of the possession and that it is not necessarily as owner. This seems to us to be sufficient authority to refute the contention that such evidence was inadmissible. No one has contended in this case, as was done in the New York case, that possession raised a presumption of ownership where the possession is shown to be equally consistent with title in some one else as with title in the person having possession. In this case it was shown that since the time plaintiff claims to have acquired title to the automobile in question and until it was seized as stated above he had been in possession of it almost if not entirely to the exclusion of defendants. Under these circumstances it was certainly competent for him to show the attitude of both himself and the defendants toward that possession.

The defendants also complain of the action of the court in permitting plaintiff to read ordinances of the City and County of Honolulu in evidence, the principal objection being that they were not properly pleaded. The only mention of these ordinances contained in the pleading is in the description of the automobile involved where they are referred to by number only. The plaintiff did not claim title by virtue of anything contained in the ordinances but they were referred to as the ordinances under which the automobile was registered for the purpose of identification and for the purpose of showing that there are two classes of registration, one for private own-

Opinion of the Court.

ers and one for dealers. Having read the ordinances in evidence the plaintiff then showed that he had caused the automobile to be registered under the provisions of the ordinance for the registration of cars of private owners as an act of ownership known by defendants and not objected to. Under these circumstances we do not think it was incumbent upon the plaintiff to plead the contents of the ordinances. Proof of the ordinances was preliminary to the proof that he had caused the automobile in question to be registered under the provisions applicable to privately owned automobiles.

Under another group of exceptions the contention is made that the verdict is contrary to the law and the evidence and to the weight of the evidence. By their motions for nonsuit and directed verdict these questions in various forms were raised. One of the contentions is that plaintiff's evidence, if true, shows an attempted gift of the automobile in question to the plaintiff by the defendant company and that said company being a trading corporation is without authority to make a gift of its property and the attempted gift was therefore *ultra vires*. This argument is based entirely upon the answer of plaintiff to three questions on cross examination. After having testified to all that was said by himself and by Mr. Schuman relied upon as constituting the contract or agreement he was asked: "Q. And you claim the Schuman Carriage Co. made you a gift of this car? A. Yes I claim they did. Q. It was a gift from the Schuman Carriage Co. to you? A. Yes. Q. And you claim you took it and received it as such? A. I did." The transaction which plaintiff had theretofore detailed could not properly be considered as evidencing a gift. According to his statement of the transaction there was clearly a good consideration for the transfer of title. He had been using both new and used cars belonging to the company in the discharge of his

Opinion of the Court.

duties to the company, which was not satisfactory to the company, and in order to stop this practice the company, acting through its president and general manager, agreed that he take the wrecked car as his property, repair it at his own expense and thereafter use it instead of using cars belonging to the company. Defendants met this evidence by denying that any such agreement was made. Under this state of facts it was not for the plaintiff to say whether the transaction did or did not constitute a gift and his statement that he so considered it does not make it so.

It is further contended that the evidence in behalf of plaintiff at most shows a conditional gift or sale, the condition being that plaintiff pay for the repairs to the wrecked automobile and since the evidence does not show that he has paid for such repairs the title to the automobile never passed to him. The court instructed the jury in effect that if the defendant company turned the automobile over to plaintiff under the circumstances testified to by him, with the intention that it should thereafter be plaintiff's but that plaintiff has not paid for the repairs made thereon in the shop of the defendant company, the plaintiff under such circumstances became the owner of such automobile and the payment for repairs is a matter of independent adjustment between plaintiff and defendant company. The court also instructed the jury in effect at the request of defendants that if it believed from the evidence that the defendant company merely allowed the plaintiff to use and possess the automobile in question while associated in business with said company and did not intend any title in the same should vest in or pass to plaintiff then to find for the defendants. We are unable to see how the defendants could have been given fuller advantage of their claim in this respect. The whole matter was submitted to the jury under proper instructions

Opinion of the Court.

and upon ample evidence and the jury found against them.

Counsel urge that there was a misjoinder of parties defendant. The evidence shows unmistakably that whatever the defendant Gustave Schuman did in the way of taking and detaining the property was merely as the agent and servant of the Schuman Carriage Company, Limited, and not in his own behalf or on his own account and counsel contend that he was therefore improperly joined in this action. In *Hewitt v. Watertown Steam Engine Co.*, 65 Ill. Ap. 153, 160, the same contention was made under like circumstances. The court in that case said: "It is suggested in the brief that appellant Hewitt was not properly made a defendant, and that he was entitled to a verdict on the pleas of *non cepit* and *non detinet*, because what he did in the way of taking and detaining the property was merely as the agent and servant of the Davies Coal Company, and not in his own behalf or on his own account. The act was tortious and was avowed by him as well as by the company of which he was the representative. We see no reason why the servant may not be joined with the company in replevin as well as in trover or trespass, or case for a tort committed by him in the course of his service to the company." See *Lazarus v. Carter*, 11 Haw. 541.

The jury attempted to return a verdict in favor of plaintiff and against both defendants for the restitution of the automobile and in the alternative for \$1620 damages. The court refused to receive this verdict and instructed the jury to reform it so as to bring the amount thereof within the evidence, which was done by reducing the alternative damages to \$1400. This action of the court was excepted to by defendants. The action of the court was proper. The verdict which the jury attempted to return was improper being for an amount greater than

Syllabus.

the highest value placed upon the automobile by the evidence. The court was not only justified in refusing to receive the verdict for \$1620 but properly instructed the jury to retire and make a change in the amount of the value not to exceed \$1400. The evidence of Mr. Paxson, and the only evidence in the case on that point, was that it was only \$1350 or \$1400. The corrected instruction dealt only with value. The evidence being undisputed the court was authorized to call the attention of the jury to the evidence as it could have done, and no doubt would have done, in the first instance, had an instruction on that point been requested.

While we have not discussed all of the forty-eight exceptions we have considered them all and find them without merit. The exceptions are therefore overruled.

E. C. Peters (*Peters & Smith* on the brief) for plaintiff.

C. S. Davis and *C. H. Olson* (*Brown, Cristy & Davis* and *Robertson, Castle & Olson* on the brief) for defendants.

MARY E. FOSTER *v.* WAIAHOLE WATER COMPANY, LIMITED.

No. 1164.

SUBMISSION UPON AGREED STATEMENT OF FACTS.

ARGUED DECEMBER 1, 2, 3, 1920.

DECIDED JANUARY 17, 1921.

COKE, C. J., KEMP AND EDINGS, JJ.

DEEDS—leases—merger.

Where a lessee for years acquires the fee in the property leased the lesser estate is merged in the greater.

TENANCY IN COMMON—conveyance of water right by one cotenant.

Where a cotenant conveys his undivided interest in the water

Opinion of the Justices.

rights of the cotenancy the deed is valid as between the parties thereto and voidable by the nonassenting cotenants to the extent only that they may show that the transfer is prejudicial to them.

SAME—same—easements.

It is settled law that one cotenant may transfer his undivided interest or any aliquot part thereof to a third person and the modern rule is that one of the cotenants may by metes and bounds convey a specific part of the common property by a deed valid between the grantor and grantee and voidable by the nonassenting tenants in common to the extent only that the conveyance may impair or vary their rights. And the rule is the same whether the deed conveys the fee or an easement only.

OPINION OF THE JUSTICES BY COKE, C. J.

This cause is here on a submission. The agreed facts briefly stated are as follows: In December 1912 the plaintiff Mary E. Foster was the owner of approximately 9/10 of the shares of the hui of Kahana, Island of Oahu; L. L. McCandless was the owner at that time of 1/16 of the shares of the said hui. The hui lands are situated at Kahana, Oahu, and comprise 5267 acres of land extending from the summit of the Koolau range to the sea on the windward side of Oahu. This tract is covered by L. C. A. 8452, Ap. 2, R. P. 4387 to A. Keohokalole. At the date above mentioned the said L. L. McCandless was the owner of lands and interests in lands in the ahupuaa of Waikane and elsewhere in that vicinity a few miles to the southwest of Kahana. The defendant, the Waiahole Water Company, Limited, entered upon an enterprise to acquire water and water-rights on the windward side of Oahu where there was an abundance of water and to convey the same through and across the mountains to the arid lands on the leeward side of the island. Pursuant to this plan the water company on December 21, 1912, obtained from the hui of Kahana a lease at a rental of \$40,000 per annum to run for fifty years from the date water should be delivered through the tunnel to or in

Opinion of the Justices.

the Koolau range which the company purposed constructing (which date in fact turned out to be May 27, 1916,) of the hui's water or water rights appurtenant to the ahupuaa of Kahana above the level of a proposed conduit which was to be between the elevation of 774 and 790 feet above sea level, together with incidental rights of way and construction rights necessary for taking the water, and subject to the rights of Kahana hui members and residents of the valley below the intake to have sufficient water for irrigation and domestic purposes in Kahana. The water covered by the lease was the konohiki or surplus water as distinguished from prescriptive waters. On December 30, 1912, L. L. McCandless and the Waikane Water Company, Limited, granted and conveyed to the water company for the consideration of \$257,500 all the water and water rights owned by each of them appurtenant to the ahupuaas of Kahana, Waikane and Waiahole, together with the incidental rights of way and construction rights necessary for taking the water subject to the rights of the residents of the valley and the hui members other than the grantors to have water for domestic and irrigating purposes and subject to other provisions not material to this controversy, and subject also to the limitation that the water should be taken only above the 450 feet level. This deed conveyed all of the konohiki or surplus waters and the prescriptive and other waters, if any, so far as owned or controlled by the grantors, with the exception above noted. On March 7, 1916, L. L. McCandless for the consideration of \$20,000 released and quitclaimed to the plaintiff Mary E. Foster all his right, title, interest and estate in and to his shares and parts or interests in shares of the hui land of Kahana and in his kuleanas in the ahupuaa of Kahana.

We thus have three instruments to deal with, the first of which will hereafter be referred to as the Kahana

Opinion of the Justices.

lease, the second as the Kahana deed and the third as the Foster deed.

The Waiahole Water Company (which we will refer to as the water company) has under the provisions of the Kahana lease been required to pay the rent reserved to the lessees therein, to wit, the sum of \$40,000 per annum since May 27, 1916. At the same time it has claimed and still claims that having purchased the interests of Mr. McCandless in the hui water and water rights demised in the Kahana lease it is entitled to withhold its proportionate share of the rent hereafter to be paid by it and to have returned its proportionate share thereof. paid since May 27, 1916, and which has been impounded by agreement of the parties pending the outcome of this proceeding. We have therefore before us the following questions which have been reserved for our decision:

“(1) Whether said indenture of December 30, 1912, was effectual to grant or convey to said Waiahole Water Company, Limited, the waters, water rights and other rights or easements, or any of them, purported to be granted or conveyed by said indenture, notwithstanding that at the date of said indenture of December 30, 1912, said Mary E. Foster was and ever since has been and now is a cotenant of said land and as such cotenant now questions the validity of said indenture of December 30, 1912, and desires the same to be held void, as to said waters, water rights and other rights or easements.

“(2) Whether said Mary E. Foster, a cotenant, is estopped from asserting as such cotenant, the invalidity of the grant of said waters, water rights or other rights or easements by the fact of said indenture of March 7, 1916, from said L. L. McCandless to her.

“(3) Whether said indenture of March 7, 1916, was effectual to grant or convey to said Mary E. Foster the shares, parts of shares and undivided interests in said ahupuaa mentioned in paragraph V hereof, as formerly owned by said L. L. McCandless together with said

Opinion of the Justices.

waters, water rights and other rights or easements pertaining to or in respect of the same, notwithstanding said indenture of December 30, 1912, and not subject thereto, and free and clear of the rights and title claimed by said Waiahole Water Company, Limited, to have been acquired by it under said indenture of December 30, 1912.

“(4) Whether said Mary E. Foster or said Waiahole Water Company, Limited, is entitled to the proportionate share of the rentals payable under said indenture of December 21, 1912, in respect to the waters and water rights and other rights or easements pertaining to or in respect to said shares and parts of shares or undivided interests so formerly owned by said L. L. McCandless.”

The term “hui,” as employed in local parlance, denotes a tenancy in common. This court has already defined the status of the hui of Kahana as follows: “The Hui of Kahana as such is not a legal entity. It is neither a corporation nor a partnership. The title to its lands is not in a trustee for its use and benefit but is held in undivided interests by the members themselves as tenants in common.” *In re Taxes Hui of Kahana*, 21 Haw. 676, 678. There can be no question of the validity and purpose of the Kahana lease. This lease was executed by all the members of the hui through duly authorized agencies.

Counsel for Mrs. Foster maintain that the first and second questions above should be answered in the negative and that the third and fourth questions should be answered favorably to Mrs. Foster, and in support of their position they contend: “First, that the deed of December 30, 1912, did not purport to, and could not convey more than was left unconveyed by the lease of December 21, even assuming that the small cotenant could convey something with respect to water rights and easements appurtenant to the lands of the cotenancy. Second, that it is a thoroughly established rule of law that a cotenant cannot convey easements with respect to the

Opinion of the Justices.

lands of the cotenancy, and that any such attempted conveyance is simply void. Third, it is submitted that there is no possible case for the estoppel of the plaintiff in this action to assert the invalidity of the deed in question. She was the principal owner in the hui of Kahana at the time that her small cotenant purported to convey the easements in question against her and the other cotenants. There was no case for an estoppel then, and she is not estopped now, merely because she has since then acquired the interest of that cotenant in the said hui. Fourth, it is submitted that even if we assume that the Waikane deed by referring to the lands of Kahana conveyed water rights already conveyed; even if we forget for the moment the fact that a purported conveyance of easements by a cotenant is void; and even if we assume that the principal owner by buying out the small interest of a cotenant who has purported to convey easements against her, has thereby been estopped to show that the conveyance was void *ab initio* as against her and her other cotenants; there is, nevertheless, purported to be conveyed by the deed of December 30, nothing but water rights and easements, so that, by no possible conception of the law or facts, could it be construed to be an assignment of rentals for water rights already transferred. On no theory of the law is the water company in this case entitled to any of the rental money due under the lease of December 21, 1912."

By the terms of the Kahana lease the water company acquired the right for the term of fifty years from and after the 27th day of May, 1916, to divert, take and carry away all of the water of or appertaining to the ahupuaa of Kahana above the level of 774 feet in excess of such water as would be necessary to irrigate the lands below the point of intake which in no case should be less than 774 feet above sea level, which lands were entitled or

Opinion of the Justices.

accustomed to water, and in excess of waters necessary for the domestic purposes of residents in the valley of Kahana. The Kahana deed purports to convey to the water company all and singular the water and water rights owned or controlled by Mr. McCandless which were appurtenant to the ahupuaa of Kahana and also all water and water rights of or belonging to any share or parts of shares owned by McCandless in the hui of Kahana, and also all water rights appurtenant to any rice or taro lands in the ahupuaa of Kahana owned or controlled by McCandless, provided that all such waters must be taken or intercepted above the elevation of 450 feet above mean sea level. In another paragraph in the Kahana deed Mr. McCandless constitutes and appoints the water company his true and lawful attorney-in-fact for him and in his name, place and stead and as his act and deed to demand, collect, receipt for and take all lawful means to obtain any and all rents, issues and profits payable for any or all water or water rights appurtenant to or flowing into the ahupuaa of Kahana and intended to be conveyed to the water company by said deed. In the Foster deed Mr. McCandless quitclaimed to Mrs. Foster all of his right, title and interest in and to all lands awarded or patented situated within the ahupuaa of Kahana including all his right, title and interest in the shares or interest in shares of the hui of Kahana theretofore owned by him. This conveyance was by express terms made "subject to the indenture dated the 30th day of December, 1912, made by and between said L. L. McCandless of the first part, Waikane Water Company, Limited, of the second part, and the Waiahole Water Company, Limited, of the third part, and of record in liber 386, pages 355-366, said registry, so far as the same indenture affects the hereditaments herein expressed to be hereby released and quitclaimed."

Opinion of the Justices.

Counsel for Mrs. Foster make the contention that even assuming that a cotenant could convey an interest in water rights or easements appurtenant to the lands of the cotenancy yet because McCandless had already leased his rights in the Kahana water he could not thereafter convey the same property while the lease was in force and hence the water company acquired no rights in water by virtue of the Kahana deed, and they make the further contention that because in the Kahana deed there is no express assignment or transfer of the rent which would accrue to McCandless by the terms of the Kahana lease the right to the rent or any part thereof did not pass to the water company. We do not think the premises upon which these contentions rest are tenable because it is settled law that the existence of a lease in no sense prevents conveyances of the property demised and it is also the rule that a grant of demised property carries with it as an incident of ownership the right to the rent. See *Silveira v. Ahlo*, 16 Haw. 702; 24 Cyc. pp. 1172-1175. All of the rights of Mr. McCandless in the hui of Kahana leased to the water company by the terms of the Kahana lease were conveyed to the water company by the Kahana deed and if this deed is otherwise valid the effect of it was to merge the leasehold estate in the freehold acquired by the water company through the deed for where a lessee for years acquires the fee in the property leased the lesser estate is merged in the greater. See 10 R. C. L. pp. 666, 668; *Carroll v. Ballance*, 79 Am. Dec. 354, 359.

It seems to us that the graver question involved in this case is, Was the attempted conveyance by Mr. McCandless to the water company of his undivided interest in the water rights appurtenant to the common property void under the rule relied upon by counsel for Mrs. Foster and announced in *Goddard on Easements* pp. 93, 94,

Opinion of the Justices.

and recognized in *Pfeiffer v. Regents of University*, 74 Cal. 156, and other authorities cited by counsel to the effect that a tenant in common cannot convey to a stranger or reserve to himself an easement upon the land of the cotenancy.

Counsel for Mrs. Foster invoke the rule upon two grounds. First, because such a transfer involves the conveyance of an easement and of itself amounts to an interference with the technical rights of the other cotenants, and second, because such a conveyance is an attempt to set aside and partition a part of the common property of the cotenancy and thus is an encroachment upon the rights of the other cotenants. Of course if the Kahana deed interfered with or transgressed the rights of the other cotenants it would not be valid as to them but under the circumstances of this case we fail to comprehend how their rights are detrimentally affected by the transfer from Mr. McCandless of his water rights in the ahupuaa to the water company. The water demised by the Kahana lease is properly termed ahupuaa, konohiki or surplus water and was never appurtenant to any particular part of the land and is thus distinguished from prescriptive or riparian water rights. It is this class of water which originally the chief or konohiki could dispose of at will irrespective of the rights of the other owners and tenants upon or within the ahupuaa in the prescriptive or riparian waters. *Haw'n. Com. & Sug. Co. v. Wailuku Sug. Co.*, 15 Haw. 675.

And the record before us shows that the members of the hui, who were the owners of the cotenancy, by virtue of the Kahana lease separated the konohiki water rights from the lands of the ahupuaa—a situation which has already been recognized by this court in *Re Taxes Waiahole Water Co.*, 21 Haw. 679, 682, where the court said: "There is no illegality or error in assessing the water

Opinion of the Justices.

rights separately from the ahupuaas and other lands to which they were formerly appurtenant. By act of the parties themselves, the appellant and its grantors, the water rights were severed in ownership from the lands and can no longer be regarded for the purpose of taxation, as appurtenant to the lands. * * * The intent of grantors, grantee and assessor to separate the water rights from the remaining interests in the lands is beyond doubt."

The cotenants themselves have therefore created out of the common property an easement in gross which they have recognized and dealt with as separate and independent property and we cannot conceive of any sound reason why any one of the cotenants might not transfer his interest in the easement thus created to a third party by a deed which is valid at least during the life of the easement. Of course at the expiration of the lease the easement would terminate and the water and water rights would revert to their former status. The validity of the deed as to those waters and rights would then depend upon whether it transgressed the rights of the cotenants not parties thereto.

The other water and water rights conveyed by the Kahana deed to the water company, but which are not included within the Kahana lease, to wit, the konohiki waters below the 774 foot level and the prescriptive waters belonging to the McCandless shares, are in a different status from the leased waters by reason of the fact that they have not been separated from the other property of the hui by any act of the members of the cotenancy, but it seems to us that the conveyance of those waters from McCandless to the water company must be held to be valid as between the parties to the deed and voidable by the nonassenting cotenants to the extent only that they may show that the transfer would be prejudicial to them. Mrs. Foster has made no such showing.

Opinion of the Justices.

It is settled law that one cotenant may transfer his undivided interest or any aliquot part thereof to a third person and it is the modern rule recognized by the courts of this jurisdiction that one of the cotenants may by metes and bounds convey a specific part of the common property by a deed perfectly valid between the grantor and grantee and voidable by the nonassenting tenants in common to the extent only that the conveyance may impair or vary their rights. *Scott v. Pilipo*, 24 Haw. 277, 283; *Pastine v. Altman*, 107 Atl. 803; 38 Cyc. 115. And see cases collected in note to *Pellow v. Arctic Iron Co.*, 164 Mich. 87, 128 N. W. 918, 47 L. R. A. (N. S.) 573, Am. Cas. 1912B 827. The supreme court of California in *East Shore Co. v. Richmond Belt Ry.*, 172 Cal. 174, recognizing and applying this rule, held that it is immaterial whether the deed conveys the fee or an easement only. In either case there must be no material injury to the rights and interests of the other cotenants. These views may not coincide with the expressions of some early day text writers and judges but they are in accord with reason and justice and afford protection to the rights of all concerned. The law is a progressive science and while the views of courts, judges and text writers are entitled to respect a strict adherence to precedent would prevent all progress in the law. It would, to adopt the language of Mr. Justice Matthews in *Hurtado v. California*, 110 U. S. 516, 529, be to stamp upon our jurisprudence the unchangeableness of the laws of the Medes and Persians.

In the submission the parties have stipulated that this proceeding shall be considered so far as may be in the nature of a suit in equity to quiet title or to remove a cloud from a title, etc., or any other appropriate suit or proceeding in equity.

Viewed from every angle all the equities of the controversy repose with the water company. Mrs. Foster

Opinion of the Justices.

has not shown or attempted to show any impairment of, or encroachment upon, her rights by reason of the Kahana deed. The water company has merely succeeded to the rights of Mr. McCandless in the water in controversy without disturbing or affecting her rights therein and under those circumstances it will be manifestly inequitable and fundamentally wrong to sustain her present attempt to vitiate the deed from McCandless to the water company and thus take away from the company valuable property rights which it has acquired in good faith and for which it has paid a very substantial consideration.

Our theory of the law hereinabove expressed, as applied to the facts presented by the record herein, necessarily establishes the right of the company to have refunded to it all rents which it has paid under the terms of the Kahana lease since the date of the Kahana deed in respect to water and water rights and other easements pertaining or in respect to the shares or parts of shares in the hui of Kahana formerly owned by McCandless and conveyed by him to the water company by said deed and further establishes the right of the water company to be relieved from the payment of any further rents in respect to said water and water rights. And we further hold, in the absence of any showing by Mrs. Foster of any encroachment upon her rights by reason of the Kahana deed, that said deed is valid and effectual to convey the water and water rights and other easements pertaining or in respect to the shares and parts of shares formerly owned by McCandless and conveyed by him to the water company under the terms of said deed.

These conclusions render it unnecessary for us to deal with the doctrine of estoppel presented in paragraph 2 of the reserved questions except that in this behalf it may be said that as Mrs. Foster's deed from McCandless was made expressly subject to the provisions of the Ka-

Opinion of the Justices.

hana deed she could not as the grantee of McCandless question the purpose and effect of the deed from McCandless to the water company.

The four questions propounded are therefore disposed of as follows:

Question No. 1 is answered in the affirmative.

Question No. 2 is not answered.

Question No. 3 is answered in the negative.

Question No. 4 is answered as follows: The water company is entitled to the proportionate share of the rentals payable under the lease in respect of the water and water rights pertaining to the McCandless shares.

It should be stated, however, that the answers to the foregoing questions are based upon the record before us and must not be taken as finally determining or establishing the rights of the parties in the waters of the cotenancy.

A decree will be made in accordance with the views herein expressed.

B. S. Ulrich (*Thompson & Cathcart* on the brief) for Mary E. Foster.

W. F. Frear (*Frear, Prosser, Anderson & Marx* on the brief) for the Waiahole Water Company, Ltd.

WONG WONG v. SKATING RINK, 25 Haw. 739. 739

Syllabus.

WONG WONG v. HONOLULU SKATING RINK, LIMITED, A CORPORATION, MORRIS ROSENBLDT AND FRED HARRISON.

No. 1291.

ERROR TO CIRCUIT COURT FIRST CIRCUIT.

HON. C. S. FRANKLIN, JUDGE.

ARGUED JANUARY 13, 1921.

DECIDED JANUARY 25, 1921.

COKE, C. J., KEMP, J., AND CIRCUIT JUDGE DEBOLT
IN PLACE OF EDINGS, J., DISQUALIFIED.

TRIAL—*effect of sustaining exception.*

When an exception is sustained and notice thereof is received by the circuit court it is the duty of the circuit court as a matter of law and not in consequence of any direction of this court to give effect to our decision.

SAME—*same—circuit court may look to opinion to ascertain effect of decision.*

The effect of sustaining an exception without directions depends upon the grounds on which it is based as expressed in the opinion of the court and the circuit court in order to ascertain the effect may look not only to the formal notice transmitted to it but to the whole record, including our opinion.

SAME—*effect of sustaining exception which goes to the merits.*

If the exception sustained goes to the merits of the case, that is, constitutes such a holding as necessitates a certain judgment, there is nothing left but to enter such a judgment, hence the sustaining of an exception to an order overruling a motion for nonsuit on the ground that there was nothing due the plaintiff when the suit was filed left nothing for the circuit court to do but enter the judgment of nonsuit.

OPINION OF THE COURT BY KEMP, J.

The history of this litigation and the transactions out of which it grew may be found in the opinions of this court in this case and the case of *Lewers & Cooke v. Wong Wong*. The opinions in *Lewers & Cooke v. Wong*

Opinion of the Court.

Wong are reported in 22 Haw. 765 and 24 Haw. 39. The former opinions in this case are reported in 24 Haw. 181, and 25 Haw. 92, 347 and 413. We do not deem it necessary to repeat that history. It will be sufficient to state that when the case was last before us on exceptions brought here by the defendants Rosenbledt and Harrison we held that at the time demand was made and suit filed there was nothing due on the account for which the lien was claimed; that any matters which would constitute a defense to an action of assumpsit on the account would also constitute a good defense to the suit to foreclose the lien and that such defense was available to other defendants than the debtor. This was all reasoned out in our opinion and the opinion concluded with the statement that "The decision and judgment are contrary to the law and the evidence and the exceptions thereto must therefore be sustained and it is so ordered" (25 Haw. 347, 356). Plaintiff filed his petition for rehearing and as ground therefor, among others, claimed that the order sustaining the exceptions to the decision and judgment as contrary to the law leaves it doubtful whether a new trial, further proceedings or a final judgment is ordered in the circuit court. In an unpublished opinion *per curiam* of March 10, 1920, denying plaintiff's petition for rehearing, we said: "We do not see how there could be any doubt as to the effect of our holding upon this case. The effect of our holding is that when the present suit was instituted there was nothing due under the contract and that this defense could be set up by other defendants than the debtor. Having sustained this contention of the owners who were entitled to interpose the defense the present suit must abate." Defendants then filed a motion to amend the decision by adding thereto an order sustaining their exception No. 25 to the denial by the court below of their motion for a nonsuit and adding a direction to the trial

Opinion of the Court.

court to grant the motion for said nonsuit. In granting this motion we stated that "In our decision which they ask to have amended we held that there was nothing due on said contract when the suit was filed and ordered the exceptions to the decision and judgment as contrary to the law and the evidence sustained. This holding we think necessarily sustains appellants' exception No. 25 to the overruling of their motion for a nonsuit, but in order that there may be no uncertainty or doubt in respect thereto the motion to amend the decision is granted and the decision is ordered amended so as to include the sustaining of appellants' exception No. 25 to the denial by the court of their motion for a nonsuit" (25 Haw. 413). We did not, however, include an order to the circuit court to grant the motion for a nonsuit as requested in said motion. Thereafter notice of decision duly issued to the circuit court, which notice reads as follows: "In the above entitled cause, pursuant to the opinion of the above entitled court filed March 1, A. D. 1920, the decision and judgment are contrary to the law and the evidence and the exceptions thereto must therefore be sustained and it is so ordered. And in pursuance of the decision of the above entitled court on the motion to amend decision rendered on the 8th day of April, A. D. 1920, exception No. 25 of the appellants, Morris Rosenbledt and Fred Harrison, to the denial by the court of their motion for a nonsuit is sustained." After receipt of this notice of decision by the circuit court the defendants presented to the circuit court a judgment and decision for signature and entry which it is asserted were pursuant to and in conformity with the decision of this court. The matter of signing the decision and entering the judgment coming on before the circuit court was contested by the plaintiff but notwithstanding his opposition thereto the decision was thereupon signed and filed and judgment

Opinion of the Court.

entered granting the nonsuit in favor of the defendants Rosenbledt and Harrison.

Plaintiff again brings the matter here upon writ of error and his assignments of error challenge the correctness of the ruling of the circuit judge in signing said decision and entering said judgment and also challenge the correctness of our holding when the case was last here on exceptions.

We shall enter into no discussion of the questions determined by us when the case was last here. They were then decided after exhaustive and able arguments and we are fully satisfied with the correctness of our holdings. We think it is entirely proper, however, for the plaintiff to again present those questions in order to preserve his rights in the event of a further appeal should the decision in this hearing go against him. (*Bierce v. Waterhouse*, 19 Haw. 594.)

Plaintiff contends that since we merely sustained defendants' exceptions and did not order the circuit court to grant their motion for a nonsuit he was entitled to a trial *de novo*; that if this was not our intention there should have been an order for the entry of judgment for defendants. When exceptions are overruled that is the end of the functions of this court relating thereto, nothing remaining but the order, notice or remittitur, on receipt of which the judgment in the circuit court, if entered but suspended pending the exceptions, remains in full force requiring no affirmance or other recognition from this court. If no judgment was entered by the circuit court, upon notice of the overruling of the exceptions it becomes the duty of the circuit court as a matter of law, and not in consequence of any direction of this court, to enter a proper judgment. (*Meheula v. Pioneer Mill Co.*, 17 Haw. 91; *Cotton v. Hawaii*, 211 U. S. 162.) Likewise when exceptions are sustained and notice thereof is received by

Opinion of the Court.

the circuit court it is the duty of the circuit court as a matter of law, and not in consequence of any direction of this court, to give effect to our decision.

It is true that this court has in many instances where exceptions were sustained ordered appropriate action by the circuit court, as will be seen from an inspection of our published reports (see *Ripley & Davis v. Kapiolani Est.*, 22 Haw. 86; *Lewers & Cooke v. Fernandez*, 23 Haw. 744), but we think that such orders are entirely unnecessary and at least technically wrong though not objectionable from a practical standpoint. The general practice of this court in passing upon questions presented upon exceptions is to overrule or sustain the exceptions and leave it to the circuit court without directions to give effect to our decision. The effect of a reversal without directions depends upon the grounds on which it is based as expressed in the opinion of the court (*Broderick v. District Court*, 91 Minn. 161, 97 N. W. 581) and we can conceive of no distinction on this point between a reversal without directions and the sustaining of an exception without directions. In either case, in order to ascertain the effect of our decision, the circuit court may look not only to the formal notice transmitted to it but to the whole record in the case, including our opinion. (*Wells Fargo & Co. v. Taylor*, U. S. , decided December 6, 1920.)

Let us assume that a defendant in a criminal case after conviction prosecutes an exception to an order overruling a motion to quash the indictment against him and the exception is sustained but no order made directing the action of the circuit court. Upon the receipt of a notice that such exception has been sustained it would certainly be the duty of the circuit court as a matter of law to set aside the judgment of conviction and sustain the motion theretofore overruled. If the defendant in a civil action after judgment should prosecute an exception to an

Opinion of the Court.

order overruling a demurrer to the complaint, the demurrer being based on more than one ground, and the exception be sustained but no order made directing the action of the circuit court it would likewise be the duty of the circuit court as a matter of law to vacate the judgment and sustain the demurrer and it would undoubtedly do so without directions from this court. This, however, would not require the entry of a judgment against the plaintiff unless it appeared from the opinion that the ground of demurrer sustained was of such a nature as to be decisive of the merits of the case, or if not of such a nature the plaintiff declined to amend his pleading. In other words, the circuit court is left to handle the situation as it appears in the light of the opinion after receiving notice of the decision. If the exception sustained goes to the merits of the case, that is, constitutes such a holding as necessitates a certain judgment, there is nothing left for the circuit court but to enter such a judgment.

In the case at bar we held upon what appears to be all the evidence available that at the time this suit was instituted there was nothing due the plaintiff and sustained an exception to the overruling of defendants' motion for a nonsuit for that reason. The motion for nonsuit was based on a number of grounds. Under these circumstances it was the right, and even the duty, of the circuit court to examine our opinion to determine what action it should take in order to give effect to our opinion. In the light of our opinion there was nothing left for the circuit court to do but to enter a judgment of nonsuit in favor of these defendants. There is nothing in *Hoomana Naauao v. Makekau*, 25 Haw. 593, inconsistent with this conclusion as counsel seem to think.

Finding no error in the record requiring a reversal of the judgment entered the same should be affirmed and it is so ordered.

Opinion of the Court.

A. Withington (*Robertson, Castle & Olson* on the brief) for plaintiff in error.

E. C. Peters and *H. R. Hewitt* (*Peters & Smith* on the brief) for defendants in error.

A. M. STEWART AND JAMES C. STEWART, CO-PARTNERS DOING BUSINESS UNDER THE FIRM NAME AND STYLE OF JAMES STEWART & COMPANY, v. Z. S. SPALDING.

No. 1297.

MOTION TO OPEN DEFAULT AND EXTEND TIME WITHIN WHICH TO FILE BRIEF.

ARGUED JANUARY 25, 1921.

DECIDED FEBRUARY 3, 1921.

COKE, C. J., KEMP AND EDINGS, JJ.

Per Curiam: The above named plaintiffs in error are here on a writ of error to review the judgment and proceedings of the court below. On December 28, 1920, an order was made by the chief justice of this court granting to the plaintiffs in error twenty days from that date within which to file their opening brief. No brief was filed within the time thus granted and three days after the expiration of the period plaintiffs in error presented a motion, supported by affidavit, to open the default and extend to them an additional period of twenty days within which to submit their brief. It appears by the affidavit that the failure of plaintiffs in error to file their brief as required by our former order was due to an oversight on the part of one of the attorneys for plaintiffs in error.

Subdivision 7 of Rule 3 of the supreme court provides

Opinion of the Court.

that when an appellant is in default in the matter of filing his brief "the case *may* be dismissed." As was held *In re Kioloku*, 25 Haw. 170, the intention of this rule is to leave it discretionary with the court whether or not the penalty of the rule will be inflicted for every failure to comply with the provisions as to the filing of briefs. It was also held in *Keahilihau v. King*, 25 Haw. 139, that where the appellant failed to file any brief within the time allowed and his conduct showed a decided laxness in the prosecution of the appeal the extreme penalty provided by the rule was none too severe. In the present case, however, we are inclined to the view that the plaintiffs in error are not guilty of gross carelessness or laxness in the prosecution of their appeal; their default was of short duration and immediately upon the discovery thereof they moved for an order setting aside the default and have by their affidavit shown circumstances in extenuation of their inaction. In the case of *Lowe v. Trotter, et al.*, now pending before us a similar question arose and upon a proper showing the petitioner was granted additional time to file his brief although his time had expired under the rule hereinabove quoted. Of course no inflexible rule as to the showing necessary to be made can be laid down because the degree of diligence, or lack thereof, will vary in each individual instance. Under the circumstances of this case we are of the opinion that it would be a penalty too great to inflict upon the plaintiffs in error to dismiss their appeal for failure to comply with the strict letter of the rule where they have shown that their default was of brief duration and was the result of inadvertence and when discovered was promptly brought to the attention of this court.

The motion of plaintiffs in error to open the default herein is hereby granted and they are allowed twenty days from the date hereof, or such other and additional

Syllabus.

time as may be allowed, within which to file their opening brief.

M. F. Prosser, for the motion.

W. B. Lymer, contra.

TERRITORY v. CHARLES A. WILLS.

No. 1298.

TERRITORY v. JAMES K. KAHUE.

No. 1299.

RESERVED QUESTIONS FROM CIRCUIT COURT FIRST CIRCUIT.

HON. J. T. DEBOLT, JUDGE.

ARGUED JANUARY 25, 26, 1921.

DECIDED FEBRUARY 4, 1921.

COKE, C. J., KEMP AND EDINGS, JJ.

OFFICERS—*policeman a public officer.*

A duly commissioned and acting police officer of the City and County of Honolulu is a public officer within the provisions of section 3944 R. L. 1915.

SAME—*special policeman without pay a public officer.*

A duly commissioned and acting special police officer without pay from any governmental authority, but paid by a private person for services in guarding private property of such person and appointed by the sheriff of the City and County of Honolulu at the request of such person, is a public officer within the provisions of section 3944 R. L. 1915 while acting under color of his commission.

SAME—*appointment of special police officer without pay, how and by whom made.*

The sheriff of the City and County of Honolulu is authorized to appoint without the approval of the civil service commission under chapter 117 R. L. 1915 special police officers without pay.

INDICTMENT AND INFORMATION—*sufficiency of.*

Where by the use of the words "as aforesaid" language theretofore used in an indictment is brought forward into the charging

Opinion of the Court.

part of the indictment it is unnecessary to repeat such language but the indictment will be read as though the language thereby referred to was repeated.

OPINION OF THE COURT BY KEMP, J.

The defendant Charles A. Wills, as a police officer of the City and County of Honolulu, was indicted for the crime of extortion under section 3944 R. L. 1915. The defendant James K. Kahue, as a special police officer, was indicted for the same crime under the same section.

The indictment against the defendant Wills, omitting the formal parts, is as follows: "that Charles A. Wills, at the City and County of Honolulu, Territory of Hawaii, and within the jurisdiction of this Honorable Court, on the third day of September, 1920, he, the said Charles A. Wills, being then and there a public officer, to wit, a duly commissioned and acting police officer of the District of Ewa, City and County of Honolulu, Territory of Hawaii, by color of his office, unlawfully, wilfully, corruptly, feloniously and extorsively and with intent in him, the said Charles A. Wills, to extort, obtain and procure of and from one Kajun Jaha certain sums of money for the sole benefit and profit of him, the said Charles A. Wills, did menace and threaten the said Kajun Jaha that unless he, the said Kajun Jaha would pay to him, the said Charles A. Wills, certain sums of money, he, the said Charles A. Wills, would arrest and cause to be confined in a jail of the City and County of Honolulu, Territory of Hawaii, said Kajun Jaha upon an alleged charge of unlawfully having in his possession certain intoxicating liquor known as okolehao. And that by means of the menace and threat made as aforesaid, the said Charles A. Wills, by color of his office, unlawfully, wilfully, corruptly, feloniously and extorsively did extort and obtain from the said Kajun Jaha certain moneys of the aggregate amount and value of

Opinion of the Court.

One Hundred (\$100.00) Dollars, well knowing that he, the said Charles A. Wills, had not any legal authority or right to exact the same, and did then and there and thereby commit the crime of extortion in the second degree." The indictment against the defendant Kahue, with the exception of names, dates and the amount of money extorted, and he being described as a duly commissioned and acting special police officer without pay, is the same as the indictment against the defendant Wills.

The section of the statute under which the indictments are drawn is as follows:

"Sec. 3944. By public officer. Whoever, being a public officer of any description, civil, judicial, military, or other, by color of his office, wilfully and corruptly extorts from another for his own benefit and profit, any thing of value, knowing that he has not any legal authority or right to exact the same, is guilty of extortion in the second degree."

The defendants demurred to the indictments and by their demurrers raised the questions of whether a policeman and a special policeman are public officers within the meaning of said section 3944, and whether the indictments set forth facts sufficient to constitute an offense under the laws of the Territory of Hawaii and particularly under said section 3944. The circuit judge being in doubt as to the merits of the questions raised by the demurrers has reserved said questions to this court, the questions in the Wills case being as follows:

"1st. Is a duly commissioned and acting police officer, a public officer within the provisions of Section 3944 of the Revised Laws of Hawaii, 1915?

"2nd. Does the indictment set forth facts sufficient to constitute an offense under the laws of the Territory of Hawaii?"

and the questions in the Kahue case as follows:

Opinion of the Court.

“1st. Is a duly commissioned and acting special police officer without pay a public officer within the provisions of Section 3944 of the Revised Laws of Hawaii, 1915?

“2nd. Is a duly commissioned and acting special police officer without pay from any governmental authority, but paid by a private person or concern for services in guarding private property of such person or concern, and appointed by the sheriff of the City and County of Honolulu at the request of such person or concern, a public officer within the provisions of Section 3944 of the Revised Laws of Hawaii, 1915, while not in the act of performing such service but while acting under color of said commission?

“3rd. Does the appointment by the sheriff of the City and County of Honolulu of a special police officer without pay require the approval of the Civil Service Commission under Chapter 117, Revised Laws of Hawaii, 1915, and if so, is an appointee without such approval a de facto officer, and as such a public officer within the provisions of Section 3944 of the Revised Laws of Hawaii, 1915?

“4th. Does the indictment set forth facts sufficient to constitute an offense under the laws of the Territory of Hawaii?”

Both defendants are represented by the same counsel and in compliance with a stipulation entered into between counsel for the defendants and the deputy city and county attorney and approved by the court the two cases have been briefed and argued together and will be disposed of in one opinion.

First as to whether defendant Wills, a duly commissioned and acting police officer, is a public officer within the meaning of the section above quoted. We think the solution of this question depends upon whether there has been created by law a public office in which he has been selected to serve as required by law. A public officer is one who holds a public office. There is no contention

Opinion of the Court.

that the position which the defendant holds, if it rises to the dignity of an office, is not a public office. The contention is that a policeman is a mere employee of the City and County of Honolulu and holds a position as distinguished from an office. In support of this argument defendant cites the workmen's compensation act and the civil service act. Section 1872 R. L. 1915 (the civil service act) prescribes that no person shall hold or be appointed to any position either in the police department or in the fire department without the approval of the civil service commission in accordance with its rules and regulations. The succeeding sections refer to the persons to be "employed" in the police and fire departments and prescribes the manner of determining their qualifications for the "positions" sought in said departments and nowhere refers to such positions as offices. The workmen's compensation act (Act 221 S. L. 1915) provides: "This act shall apply to employees (other than officials as hereinafter defined) of the Territory and all counties" etc. Officials excepted are those elected by popular vote or who receive salaries exceeding \$1800 a year. The argument is that the reference in these statutes to a position and an employee, instead of to an office or an officer, indicates a legislative construction to that effect. We think, however, that there is nothing inconsistent in referring to an office as a position or even as an employment or to the incumbent of an office as an employee. In fact Chief Justice Marshall, than whom there is no greater authority, in defining the nature of an office, has recognized the fact that an office is an employment in the following language: "An office is defined to be 'a public charge or employment,' and he who performs the duties of the office, is an officer. If employed on the part of the United States, he is an officer of the United States. Although an office is 'an employment,' it does not follow that every

Opinion of the Court.

employment is an office. A man may certainly be employed under a contract, express or implied, to do an act, or perform a service, without becoming an officer. But if a duty be a continuing one, which is defined by rules prescribed by the government, and not by contract, which an individual is appointed by government to perform, who enters on the duties appertaining to his station, without any contract defining them, if those duties continue, though the person be changed; it seems very difficult to distinguish such a charge or employment from an office, or the person who performs the duties from an officer." *The United States v. Maurice*, 2 Brock, 96, 102.

The case from which the above quotation was taken was a civil suit by the United States against the principal and his sureties upon a bond given by an agent of fortifications and therefore does not meet defendant's contention that this being a criminal prosecution the statute should be strictly construed. However, in *United States v. Hartwell*, 73 U. S. 385, the supreme court in construing a criminal statute held that a clerk in the office of the assistant treasurer of the United States at Boston, appointed by him with the approbation of the secretary of the treasury, having the care and subject to the duty to keep safely the public moneys of the United States, was a public officer within the meaning of a statute which declared that "All public officers of whatever grade be and they are hereby required to keep safely without loaning, using, depositing in banks or exchanging for other funds than as allowed by this act, all public moneys collected by them," etc., and making a violation thereof a felony. In the discussion as to what constitutes an office the court said (p. 393): "An office is a public station, or employment, conferred by the appointment of government. The term embraces the ideas of tenure, duration, emolument and duties. The employment of the defendant was in the

Opinion of the Court.

public service of the United States. He was appointed pursuant to law, and his compensation was fixed by law. Vacating the office of his superior would not have affected the tenure of his place. His duties were continuing and permanent, not occasional or temporary. They were to be such as his superior in office should prescribe. A government office is different from a government contract. The latter from its nature is necessarily limited in its duration and specific in its objects. The terms agreed upon define the rights and obligations of both parties, and neither may depart from them without the assent of the other." In discussing the question of construction the court said (pp. 395, 396): "We are not unmindful that penal laws are to be construed strictly. It is said that this rule is almost as old as construction itself. But whenever invoked it comes attended with qualifications and other rules no less important. It is by the light which each contributes that the judgment of the court is to be made up. The object in construing penal, as well as other statutes, is to ascertain the legislative intent. That constitutes the law. If the language be clear it is conclusive. There can be no construction where there is nothing to construe. The words must not be narrowed to the exclusion of what the legislature intended to embrace; but that intention must be gathered from the words, and they must be such as to leave no room for a reasonable doubt upon the subject. It must not be defeated by a forced and over-strict construction. The rule does not exclude the application of common sense to the term made use of in the act in order to avoid an absurdity, which the legislature ought not to be presumed to have intended. When the words are general and include various classes of persons, there is no authority which would justify a court in restricting them to one class and excluding others, where the purpose of the statute is alike applicable to all. The

Opinion of the Court.

proper course in all cases is to adopt that sense of the words which best harmonizes with the context, and promotes in the fullest manner the policy and objects of the legislature. The rule of strict construction is not violated by permitting the words of the statute to have their full meaning, or the more extended of two meanings, as the wider popular instead of the more narrow technical one; but the words should be taken in such a sense; bent neither one way nor the other, as will best manifest the legislative intent."

As we have said, there is no contention that the defendant Wills did not receive his appointment in the manner prescribed by law. Nor is there any contention that the position which he holds is not created by general law. The duties which a policeman is required to perform are of a public nature such as conserving the public peace, etc., and his employment embraces the idea of tenure, duration, emoluments and, as we have said, duties of a public nature. We think that we are not violating any of the rules laid down by the eminent authority cited in holding that a duly commissioned and acting police officer of the City and County of Honolulu is a public officer within the meaning of the statute involved. To hold otherwise we think would be to narrow the words used to the exclusion of what the legislature intended to embrace. In common parlance a policeman is referred to as an officer and to hold that the term "public officer," as used by the legislature in the statute in question, does not include a duly commissioned and acting policeman, who is placed in the most favorable position of all public officers to extort money from individuals by color of his office, would render the legislation absurd.

In this jurisdiction a policeman is neither required to give a bond nor take an oath of office and some argument is based on these facts. We think, however, that the oath

Opinion of the Court.

and bond are mere incidents of an office and no essential part of it. They may or may not be required of an officer according to usage or law. *State v. Stanley*, 66 N. C. 56, 8 Am. Rep. 488; *Johnston v. Wilson*, 2 N. H. 202, 9 Am. Dec. 50.

The question of whether the defendant Kahue is a public officer presents a different question. The indictment alleges that he is "a duly commissioned and acting special police officer without pay," etc. But it is stipulated by the parties that he was not appointed from the list of eligibles furnished by the civil service commission but was appointed and commissioned by the sheriff of the City and County of Honolulu, his commission being in the form of the commission of regular policemen with an annotation to the effect that he is commissioned "as special police without pay;" that he is employed by Y. Ahin as a watchman to guard a cane field and paid for such services by said Y. Ahin; that without the consent or instigation of Y. Ahin and not as any part of said service to Y. Ahin the defendant is alleged to have done the acts charged in the indictment.

Counsel for defendants make the same contentions as to the status of Kahue as are made as to the status of Wills and in addition contend that the sheriff of the City and County of Honolulu has no authority under the law to appoint special policemen whether selected from the list of eligibles furnished by the civil service commission or not and that if it should be held that he has such authority he is confined to such list of eligibles. Since no one except the sheriff is claimed to have the authority to appoint special policemen without pay the effect of saying that he is entirely without authority to appoint such a policeman is equivalent to saying that no such office exists and that therefore there can be no such officer. We shall therefore examine the statutes to see whether the sheriff has such authority.

Opinion of the Court.

Section 1442 R. L. 1915, enacted in 1888, authorized the high sheriff of the Territory, subject to the approval of the attorney general, to appoint policemen and also authorized him to appoint any number of special police officers to serve without pay without the approval of any one. The county act of 1905 among other provisions authorized the county sheriff of each county to exercise all the powers, privileges and authority, and required him to perform all the duties in his own jurisdiction, the same being the county in and for which he shall have been elected, as are by law provided to be had, exercised and performed by the high sheriff of the Territory. (Sec. 1559 R. L. 1915.) And again by section 1745 R. L. 1915, which is a part of the municipal act for the City and County of Honolulu, it is provided that the city and county sheriff shall have and exercise all the duties in his own jurisdiction as are by law provided to be had, exercised and performed by the high sheriff of the Territory or by the sheriffs of the various counties respectively. It is by virtue of these statutory provisions that the Territory contends the office of special policeman has been created and the authority to make the appointment vested in the city and county sheriff. In *Moir v. Knell*, 17 Haw. 135, section 1559 R. L. 1915 is construed and it was there held that the sheriff of Hawaii by virtue of the authority conferred upon him by said section had the authority to appoint police officers within his jurisdiction without the approval of the high sheriff, the attorney general or the board of supervisors. The reasoning there applied to the question of the appointment of regular policemen would apply to the appointment of special policemen under that act. Since the authority of the sheriff of the City and County of Honolulu to appoint special policemen is claimed under a statute exactly similar to the statute there discussed we would necessarily conclude that he is

Opinion of the Court.

authorized by said statute (Sec. 1745) to appoint special policemen without pay without the approval of any one unless by subsequent legislation that power has been revoked.

Counsel for defendants have called our attention to section 1751 R. L. 1915 as amended by Act 62 S. L. 1919, which reads in part as follows:

“The sheriff shall have power to appoint under civil service regulations, as provided by law, such police officers, and at such salaries as may be allowed from time to time by the board of supervisors; provided that no civil service regulation shall be construed to prevent the board from abolishing any position of police officer theretofore allowed and revoking the salary or compensation therefor, and in such case the person dismissed if in good standing may, by written request to the sheriff within thirty days, be placed at the top of any list of eligibles for civil service appointment. And the sheriff further shall have power to appoint and remove at pleasure any deputy sheriffs, clerks, stenographers or other assistants, not under civil service, and at such salaries or compensation as may be allowed by the board of supervisors.”

This section, like section 1745, is a part of the municipal act of the City and County of Honolulu. As originally enacted it did not deal with the authority of the sheriff to make appointments but dealt with the authority and duties of deputy sheriffs within their respective districts. By the amendment of 1919 the portion above quoted was added. It will be seen that this section now deals quite generally with the authority of the sheriff to make appointments but it does not mention special policemen nor does it expressly repeal or amend the section (1745) under which the sheriff is authorized to appoint special policemen without pay. Does it repeal or amend said section by implication? When two statutes cover, in whole or in part, the same subject-matter, and are not

Opinion of the Court.

absolutely irreconcilable, no purpose of repeal being clearly shown, the court, if possible, will give effect to both. When, however, a later act covers the whole subject of earlier acts and embraces new provisions, and plainly shows that it was intended not only as a substitute for the earlier act, but to cover the whole subject then considered by the legislature, and to prescribe the only rules in respect thereto, it operates as a repeal of all former statutes relating to such subject-matter, even if the former acts are not in all respects repugnant to the new act. But in order to effect such repeal by implication it must appear that the subsequent statute covered the whole subject-matter of the former one, and was intended as a substitute for it. If the later statute does not cover the entire field of the first and fails to embrace within its terms a material portion of the first, it will not repeal so much of the first as is not included within its scope, but the two will be construed together, so far as the first still stands. (36 Cyc. 1077.) Applying these principles we conclude that section 1751 does not revoke the authority conferred upon the sheriff of the City and County of Honolulu to appoint special police officers without pay.

But the civil service act provides that "No person shall hold or be appointed to any position either in the police department or in the fire department of the City and County of Honolulu without the approval of the commission in accordance with its rules and regulations" (Sec. 1872 R. L. 1915). In *Moir v. Knell*, *supra*, the court came to the conclusion that a county sheriff is authorized to appoint police officers without the approval of the attorney general notwithstanding the fact that the high sheriff was authorized to appoint such officers (prior to the county act) only with such approval and notwithstanding the fact that this authority was transferred to county sheriffs in general language giving them the same

Opinion of the Court.

authority in their respective counties, on the ground that any other construction would fail to harmonize with the general intent of the act, and said: "Any other rule would have prevented (permitted) the evils of a house divided against itself and worked injuriously upon the entire department of justice" (p. 141). Likewise we think to hold that the sheriff is prevented by the civil service act from appointing special police officers except from the list of eligibles furnished by the civil service commission would be contrary to the general intent of the act and would work injuriously upon the entire department. The general purpose of the civil service act is to give permanence to the positions to which it relates, a purpose entirely inconsistent with the nature of the position held by a special police officer without pay who is generally appointed in cases of emergency and ceases to act when the emergency passes.

We conclude therefore that the statutes discussed neither repeal nor amend that portion of the statute conferring authority upon the sheriff of the City and County of Honolulu to appoint special police officers without pay and that under the indictment and the additional facts stipulated the defendant Kahue is a public officer within the meaning of the section of the statute under which the indictment is drawn.

Some argument is based upon the fact that the defendant Kahue was appointed at the request of a private person and is paid by such person for services in guarding private property. We cannot concede that this prevents him from being a public officer, entitled to all the immunities and subject to all of the penalties of a regular police officer while acting under color of his office. Such officers, in the opinion of the courts, act sometimes as servants of the persons employing them and sometimes as officers of the government. (*McKain v. Baltimore & O. R. Co.*, 64

Opinion of the Court.

S. E. (W. Va.) 18, 23 L. R. A. (N. S.) 289 and cases cited.) The effect of the decisions is that such an appointee although paid for all of his services by the person at whose instance he was appointed is not a servant of such person in respect to all the acts he performs by virtue of his office but only in respect to services rendered the person, such as guarding his property. The indictment alleges the acts complained of were "by color of his office" and it is stipulated that the person at whose request he was appointed did not consent to or instigate the acts charged in the indictment and that they were not done as any part of the service for which he was employed by said person. To hold that such an officer does not come within the terms of the statute would be equivalent to licensing him to go forth armed with all the insignia of office to prey upon the public without incurring the risk of prosecution unless his acts came within the terms of some other statute.

We now come to a consideration of the indictments. Since the two indictments with the exception of names, dates and the amount of money extorted are the same we will use the indictment in the Wills case for the purpose of this discussion. It is attacked on the ground that it does not allege that the defendant extorted and obtained from any one "for his own benefit and profit" anything of value and therefore fails to charge the offense in the words of the statute or their equivalent. The indictment alleges in effect that the menace and threat named therein was used by the defendant with the intent to procure the money for his sole benefit and profit, and that by means of the menace and threat made as aforesaid, etc., he did extort and obtain from * * * certain moneys of the value of \$100, but fails to allege that said moneys were actually obtained by the defendant for his own benefit and profit. It is the contention of counsel that notwithstand-

Opinion of the Court.

ing the allegation as to the intent with which the menace and threat was used the indictment is fatally defective for want of an averment that the money was actually obtained by the defendant for his own benefit and profit. The Territory contends that the reference to the menace and threat "made as aforesaid" carries forward into that portion of the indictment which charges the actual procurement of the money the allegation that it was for his sole benefit and profit. It further contends that if this does not constitute a direct allegation to the effect that said money was obtained by defendant for his own benefit and profit it is an indirect allegation of such fact and therefore sufficient under section 3791E of Act 215 S. L. 1915, which provides that "No indictment or bill of particulars is invalid or insufficient for the reason merely that it alleges indirectly and by inference instead of directly any matters, facts or circumstances connected with or constituting the offense, provided that the nature and cause of the accusation can be understood by a person of common understanding."

If the phrase "by means of the menace and threat as aforesaid" does not refer to the intent with which said menace and threat was used, as already recited, we are unable to discover anything in the indictment to which it does refer. If such phrase does, as we think it must, refer to the intent with which the menace and threat was used by the defendant then the latter part of the indictment in the Wills case would read as follows: "And that by means of the menace and threat made with the intent in him, the said Charles A. Wills, to extort, obtain and procure of and from one Kajun Jaha certain sums of money for the sole benefit and profit of him, the said Charles A. Wills, the said Charles A. Wills by color of his office unlawfully, wilfully, corruptly, feloniously and extorsively did extort and obtain from the said Kajun Jaha

Opinion of the Court.

certain moneys of the aggregate amount and value of one hundred (\$100.00) dollars, well knowing that he, the said Charles A. Wills, had no legal authority or right to exact the same," etc. When thus read the indictment charges every element of the offense described in the section under which the indictment is drawn and must be held to be sufficient.

It follows from what we have said that both questions in the Wills case must be answered in the affirmative and that the first, second and fourth questions in the Kahue case should be answered in the affirmative. The first portion of the third question in the Kahue case should be answered in the negative. The second portion of said question need not be answered.

H. E. Stafford, Third Deputy City and County Attorney (*W. H. Heen*, City and County Attorney with him on the brief) for the Territory.

C. S. Davis (*Brown, Cristy & Davis* on the brief) for defendants.

TERRITORY *v.* KENICHI KOBAYASHI, NAMARU FUJITA, KOSHICHIRO FURUSHIO, AND SAKUSUKE TAKAMAKU, ALIAS SAKUSUKE TAKAMATSU.

No. 1305.

MOTION TO DISMISS WRIT OF ERROR..

ARGUED JANUARY 25, 1921.

DECIDED FEBRUARY 5, 1921.

COKE, C. J., KEMP AND EDINGS, JJ.

Per Curiam: This is a motion to dismiss the writ of error issued in the above entitled cause on the ground

Opinion of the Court.

that the plaintiffs in error have failed to file the necessary papers to constitute the record as provided by law and the rules of this court, although more than twenty days have elapsed since the issuance of said writ, in that there is no transcript of the evidence among the papers filed and that plaintiffs in error in their praecipe did not request the clerk of the circuit court to include the transcript of evidence as required by law and the rules of this court and that a transcript of the evidence in this case is necessary for a proper determination of the issues raised by the assignments of error as shown on the face thereof.

It is alleged in the motion and borne out by the record that the plaintiffs in error in their praecipe requested the clerk of the circuit court to send up a partial transcript of the evidence, which partial transcript has been filed, but it is further alleged in said motion that said partial transcript of the evidence is not sufficient to enable this court to determine the issues raised by the assignments of error.

Section 2524 R. L. 1915 as amended by section 4 of Act 44 S. L. 1919 prescribes what the record on writ of error shall be deemed to include and is as follows:

“The record shall be deemed to include the judgment, order or decree and the pleadings, and such other papers and things, including the verdict, decision, rulings, instructions, notes of exceptions, motions, clerk’s minutes, exhibits, and transcript of the evidence, as may be designated in a praecipe filed by the plaintiff in error.”

Rule 1 of this court is in part as follows:

“If the necessary papers are not filed in this court within twenty days after the issuance of a writ of error, perfecting of an appeal or allowance of a bill of exceptions or such further time as may be allowed by this court or a justice thereof the appeal may be dismissed for want of prosecution.”

Opinion of the Court.

It of course cannot be successfully maintained in every case brought to this court on writ of error that a transcript of the evidence is necessary to a determination of the issues raised by the assignments of error. This would be especially true in a case where a demurrer to the sufficiency of an indictment had been overruled and the defendant after conviction came to this court on writ of error and assigned no other error than the ruling on his demurrer to the indictment. Under no circumstances can we conceive that a transcript of the evidence in such a case would be a necessary part of the record. Other circumstances might be recited under which a transcript of the evidence would be unnecessary.

We think therefore that the solution of the question presented by the motion to dismiss the writ of error, namely, whether we have before us a sufficient record from which we may determine the issues raised by the assignments of error, depends upon an examination of the assignments of error and the partial transcript of evidence on file. If any one or more of the assignments of error can be passed upon with the record brought up clearly the Territory is not entitled to have the writ dismissed, but the case would be retained for the purpose of passing upon such assignment or assignments of error as can be examined and determined upon the record before us.

The first assignment of error after reciting facts which show that the plaintiffs in error were indicted for an assault upon Mahachi Ogata (a fact borne out by the record) continues as follows:

“That upon the trial of said indictment, one Ogata (claimed by the prosecution to have been and to be the person alleged in and by said indictment to have been assaulted by said defendants), having been called as a witness for the prosecution therein, was asked by the pros-

Opinion of the Court.

ecuting attorney to state his name, and said witness then and there stated his name to be Manpachi Ogata, and there was no testimony adduced upon said trial tending to show that the name of said last named witness was other than, or different from the name so testified by him as aforesaid, to wit, Manpachi Ogata,—nor was there any testimony adduced tending to prove that the assault charged in and by said indictment had been committed upon any person other than said last named witness.

“And counsel for said defendants, having at the close of the evidence taken upon said trial, and before said cause was argued or submitted to the jury therein, moved the court for an instruction to the jury to return a verdict of not guilty against said defendants, and each of them, because of the variance between the allegation of the indictment and the proof concerning the name of the person charged in and by said indictment to have been assaulted by said defendants,—the court overruled and denied said motion.

“FIRST ASSIGNMENT OF ERROR.

“And these petitioners and surviving defendants now respectfully allege said ruling of said circuit court to have been erroneous, and prejudicial to them, and to each of them.”

The only testimony bearing on this assignment of error brought up in the partial transcript of evidence on file is the answer of the prosecuting witness to the questions calling for his name, and is as follows: “The Clerk: What is your name, please? A Manpachi Ogata. Mr. Stafford: Q Then you do not spell that M-a-h-a-c-h-i? The Interpreter: M-a-n-p-a-c-h-i.” There is sufficient record before us to substantiate every statement contained in this assignment of error with the exception of the statement that “there was no testimony adduced upon said trial tending to show that the name of said last named witness was other than or different from the name so testified by him as aforesaid, to wit,

Opinion of the Court.

Manpachi Ogata,—nor was there any testimony adduced tending to prove that the assault charged in and by said indictment had been committed upon any person other than the said last named witness.” As to these statements there is no way of substantiating them without a complete transcript of the evidence and this we have not before us.

Counsel for plaintiffs in error has stated in argument that if the Territory wishes to dispute his statement above quoted from his assignment of error and such evidence was adduced at the trial there is nothing to prevent it from bringing up such further portions of the evidence as will establish that fact. This argument ignores the fact that the burden of showing error is on the plaintiffs in error. We necessarily approach a case with the assumption that no error has been committed upon the trial and until this assumption has been overcome by a positive showing the prevailing party is entitled to an affirmance. It would require no argument or citation of authority to show that we would be unable to say that there was no testimony adduced at the trial tending to show that the prosecuting witness, Manpachi Ogata, was not also known as Mahachi Ogata. In the absence of a record showing that there was no such evidence we would have to hold that the circuit court properly submitted the matter to the jury.

The third assignment of error is to the effect that the verdict of the jury convicting the plaintiffs in error is contrary to the law and the evidence, and the fourth is to the effect that the judgment and sentence constitute error in law and are prejudicial to them in that they were convicted of the offense of an assault committed upon Mahachi Ogata, the person alleged in the indictment to have been assaulted.

The mere statement of the effect of these assignments

Opinion of the Court.

of error would seem to be sufficient to show that they cannot be intelligently examined in the absence of a complete transcript of the evidence adduced upon the trial.

The second assignment of error presents a somewhat different situation. Here the complaint is of the refusal of the court to permit a witness for the defendants upon being recalled after the prosecution had finished its rebuttal testimony to testify in regard to the date upon which he sent out invitations to his friends to attend a celebration of his daughter's marriage, as well as the date of the celebration. The transcript contains all that took place relative to the attempt to adduce this testimony, and it is said that the evidence was desired for the purpose of corroborating the evidence of the defendant Takamatsu and certain of his witnesses to the effect that said Takamatsu attended said marriage celebration in Honolulu on the same evening the assault is said to have been committed at Waipahu—in other words, to establish an alibi in behalf of Takamatsu. It appears from what took place in the attempt to adduce this testimony that Takamatsu and two other witnesses had testified that he, Takamatsu, attended said celebration in Honolulu on the evening of March 10, the evening on which the assault is said to have been committed at Waipahu, although neither the testimony of Takamatsu nor that of his witnesses is contained in the partial transcript brought up in support of the writ. The partial transcript does contain the evidence adduced by the prosecution in opposition to that of Takamatsu and his witnesses in this respect and consists of a showing by official records that the marriage in question took place on March 8. Counsel alleged surprise and asked to be permitted to show by the witness tendered, the father of the bride, that he on the 9th of March sent out invitations to his friends to attend at his home in Honolulu a dinner and celebration of his daughter's marriage on the evening of the

Opinion of the Court.

10th and that Takamatsu was present and took part in said celebration on said evening. Apparently realizing that the evidence was not offered at the proper time counsel appealed to the court to exercise its discretion and permit the evidence to go in, which the court declined to do. The discretion which the court exercises in regulating the order of receiving evidence is, we think, a judicial discretion and subject to review for abuse, and there is probably sufficient record before us to enable us to determine whether that discretion was abused in this case. In fact we feel that we would be compelled to hear counsel upon the merits of this assignment of error but for the fact that it affects only the defendant Takamatsu and he is not a party to the writ. The judgment and sentence pronounced against him has already been reversed by a higher court than this—a court from which there is no appeal. On July 31, shortly after his conviction and sentence, Takamatsu died, and that fact is shown by the record before us as an excuse for his not joining in the application for the writ of error.

We have discussed the record at some length to show that it is insufficient to enable us to intelligently consider the merits of the assignments of error. As pointed out in *Orpheum Co. v. Dimond & Co.*, 14 Haw. 577, it was within the power of the plaintiffs in error, if not their duty, to make the transcript of the evidence a part of the record. Counsel has stated that nothing is asked “by grace” and he is entitled to nothing as a matter of right. We therefore conclude that no purpose would be served by retaining the case upon the calendar.

The motion to dismiss the writ of error should therefore be granted and it is so ordered.

H. E. Stafford, Third Deputy City and County Attorney, for the motion.

C. W. Ashford, contra.

Syllabus.

IN RE TAXES AMERICAN FACTORS COMPANY,
LIMITED.

No. 1308.

APPEAL FROM TAX APPEAL COURT FIRST CIRCUIT.

ARGUED JANUARY 18, 1921.

DECIDED FEBRUARY 10, 1921.

COKE, C. J., KEMP AND EDINGS, JJ.

TAXATION—*reduction from value of assets of corporation when ascertained by market price of its stock.*

In estimating for taxation purposes the value of the assets of a corporation forming an enterprise for profit, whose stock is quoted on the market, a small reduction is usually made from the total value of the assets of the company as indicated by the prevailing market price of the stock of the company on the assumption that it is too high because based upon the value of the shares of stock in small lots and that if the whole of the stock or large blocks thereof were put upon the market the price for that reason would be less than the market quotation.

SAME—*reduction from value of nontaxable assets.*

Where a reduction is allowed upon the total assets of the company in determining their value the same rate of reduction should likewise be allowed upon the nontaxable assets of the company.

SAME—*value of stock in other Hawaiian corporations owned by the enterprise.*

In order to ascertain the proper deductions to be made by reason of the shares of stock in other Hawaiian corporations owned by the enterprise the reasonable market value thereof should control instead of the par value or the book or so-called assessed value of the stock.

SAME—*stock held in foreign corporations—exempt from taxation when.*

Under section 1259 R. L. 1915 holders of shares of stock in corporations are not liable to be assessed in respect to their individual shares or interest in such companies, yet by the provisions of section 1257 R. L. 1915 the word "company" is held to mean only such corporations as are incorporated under the laws of the Territory and foreign corporations carrying on business in the Territory.

OPINION OF THE COURT BY COKE, C. J.

The appellant, the American Factors, Limited, an Hawaiian corporation, is an enterprise for profit doing business throughout the Territory with its main office and principal place of business in Honolulu. The company returned its property for taxation purposes as of January 1, 1920, at \$3,250,000. Thereafter the tax assessor fixed the value of the taxable property of the company at \$7,336,225. The company appealed to the tax appeal court of the first taxation division and at the conclusion of the hearing the tax appeal court fixed the value of the taxable property of the company at \$6,118,638.68. From this decision the company has perfected an appeal to this court.

The facts involved are agreed upon in a stipulation between the parties. The important issue is in respect to the basis to be employed in computing the value of the shares held by the company in other Hawaiian corporations and which are not taxable by virtue of the statutes of this Territory. The deputy attorney general, representing the tax assessor, contends that the assessed value of such stock should control. And this was the method adopted by the tax appeal court. Counsel for the company urge that the market value should be taken in determining the amount of the deduction to be allowed. The assessment is made under section 1241 R. L. 1915 as amended by Act 222 S. L. 1917. The material portions of the section applicable to this inquiry read as follows:

“Section 1241. Basis of value for taxation. All real and personal property and the interest of any person in any real or personal property shall be assessed separately as to each item thereof for its full cash value. * * *

“Provided, however, that in all cases where real and personal property, or several classes or kinds or parcels of real or personal property respectively, are combined

Opinion of the Court.

and made the basis of an enterprise for profit, the combined property forming such basis of such enterprise for profit, shall be assessed as a whole on its fair and reasonable value.

“In estimating the aggregate value of each such enterprise for profit, there shall be taken into consideration the net profits made by the same, also the gross receipts and actual running expenses; and where it is a company being a corporation whose stock is quoted in the market, the market price thereof, as well as all other facts and considerations which reasonably and fairly bear upon such valuation.

“In ascertaining the aggregate value of the property constituting the basis of an enterprise for profit for the purpose indicated in this section, there shall first be included all property combined and forming the basis of such enterprise whether within the definition of real or personal property set forth in this chapter or not, and there shall then be deducted therefrom the value of shares in other Hawaiian corporations, held or owned by such enterprise, the value of all property on which specific taxes are levied and the value of all property that would not be taxable if not so combined and made the basis of an enterprise for profit.”

In this case the total value of the capital stock of the company is agreed to be the sum of \$18,000,000 and its bills payable and other debts amount to \$3,877,053.47, indicating a total value of all assets of \$21,877,053.47. In conformity with the opinion in *Assessor v. C. Brewer & Co.*, 15 Haw. 29, 35, a small reduction is to be made from the total value of the assets of the company as indicated by the prevailing market price of the stock of the company on the assumption that it is too high because based upon the sale of shares of stock in small lots and that if the whole of the stock or large blocks thereof were put upon the market the price for that reason would be less than the market quotation. In the *Brewer* case the reduction allowed was fifteen per cent. In the present

Opinion of the Court.

case it is fixed at ten per cent. This reduction, at whatever rate it may be fixed, is at best purely arbitrary, but in the absence of any showing in the present case that a reduction of ten per cent. is unwarranted it will not be disturbed. But it seems clear to us that if any reduction is to be allowed upon the total assets of the company in determining their value the same rate of deduction should likewise be allowed upon the nontaxable assets of the company except such property as the company has separately rendered and which is separately assessed in respect to its branch houses, which in this case are shown to be of the total value of \$1,102,130.73.

In order to ascertain the proper deductions to be made by reason of the shares of stock in other Hawaiian corporations owned by the enterprise it seems to us that the reasonable market value thereof should control instead of the par value or the book or so-called assessed value of such stock. The par value is usually not the actual value of the stock and properly speaking the stock has no assessed value for the simple reason that it is not assessed. The corporation issuing the stock is assessed for the value of its property but the value of its outstanding stock may be a great deal more or a great deal less than the assessment placed upon the aggregate value of the property of the enterprise. A safe and fair method to be employed in arriving at the value of the stock is by ascertaining what it will sell for in the open market.

Based upon the foregoing manner of computing the value of the property constituting the basis of the enterprise for profit in order to determine the value of its taxable property we arrive at the following tabulated result:

<i>Capital Stock.</i>	
60,000 shares at \$300 per share.....	\$18,000,000.00
Bills payable and other debts.....	3,877,053.47
<hr/>	
Total market value.....	\$21,877,053.47

Opinion of the Court.

Less deduction of 10%..... 2,187,705.35

Net value\$19,689,348.12

Deductions.

Value of shares of stock in
Hawaiian corporations and
other nontaxable assets..\$16,498,852.44

Less deduction of 10%..... 1,649,885.24

Net value\$14,848,967.20

Difference between value net taxable and
net nontaxable assets..... 4,840,380.92

Less value branch houses..... 1,102,130.73

Net difference\$ 3,738,250.19

Less agreed value of tangible assets includ-
ing agency contracts 2,031,675.00

Increased value due to unity of use and
ownership\$ 1,706,575.19

Increased value due to unity
of ownership and appor-
tioned to taxable property. \$ 204,789.00

Agreed value of tangible prop-
erty 2,031,630.73

Taxable value of property. \$2,236,419.73

If then the value of the taxable property of the enter-
prise for profit is to be determined from the market price
of the stock of the concern such value will fall far below
the amount returned by the taxpayer.

The statute above quoted, however, provides that aside
from the market value of the stock of the company its
profits shall also be taken into consideration in arriving
at the taxable value of its assets. If therefore we capital-

Opinion of the Court.

ize the net profits for a period of eight years last past we find that the annual average amount thereof is \$448,601.25, and if, as was intimated in *Re Taxes Onomea Sugar Co.*, 25 Haw. 293, 12½% is deemed to be a fair return on the capital invested we have taxable assets of a total valuation of \$3,588,810, and after deducting therefrom the property of branch houses, separately rendered and assessed, amounting to \$1,102,130.73, the taxable property of the concern involved in the present proceeding would be \$2,486,679.27. Again, if we undertake to ascertain the value of the property by a capitalization of its profits for the past four years we find that the average annual net income for that period is \$549,303.55, which, if we again fix 12½% as a fair return upon the capital invested, the total value is \$4,394,428.40, and after deducting \$1,102,130.73, the value of the property of branch houses, the remaining taxable property would be of the value of \$3,292,297.67. By striking a general average of these varying results the value of the property will still be found to fall below the amount returned by the taxpayer.

As was said in *Tax Assessor v. Wailuku Sugar Co.*, 18 Haw. 423, "No hard and fast rule of testing values can be made to apply in all cases and yet practical common sense and a desire to assess at their fair value furnish an excellent guide." The tax appeal court clearly misinterpreted the effect of the opinion in the *Brewer* case, *supra*, and this no doubt accounts for the error into which it fell when it fixed the value of shares in other Hawaiian corporations at the "assessed" rather than the market value thereof. By this erroneous method of computation adopted by the tax appeal court the company's deduction in respect to that class of assets is reduced from \$17,600,963.17 to \$13,958,414.79.

It may be proper to draw attention to the fact that

Opinion of the Court.

there is a deduction of \$220,500 which represents the value of 300 shares of the capital stock of the American Hawaiian S. S. Co., a New York corporation, at \$735 per share. No question has been made of this by the assessor but under our statutes this stock is not exempt from taxation unless the American Hawaiian S. S. Co. is carrying on business in this Territory. For while under section 1259 R. L. 1915 holders of shares of stock in companies are not liable to be assessed in respect to their individual shares or interest in such companies yet by the provisions of section 1257 R. L. 1915 the word "company" is held to mean only such corporations as are incorporated under the laws of the Territory and foreign corporations carrying on business in the Territory, and copartnerships, etc.

We have made frequent reference herein to the former opinion of this court in re *Assessor v. C. Brewer & Co.*, 15 Haw. 29, and have adopted and applied some of the principles announced in that case, but from this fact the conclusion must not be drawn that we have approved of the opinion in toto. Some portions of it are sound and valuable as a precedent but much that is said therein is of doubtful accuracy.

The decision of the tax appeal court herein is reversed and the taxable value of the property of the appellant is fixed at the sum of \$3,250,000.

I. M. Stainback (*H. Holmes* with him on the brief) for the taxpayer.

J. Lightfoot, First Deputy Attorney General, for the assessor.

Opinion of the Court.

**TERRITORY v. KENICHI KOBAYASHI, NAMARU
FUJITA, KOSHICHIRO FURUSHIO, AND SAKU-
SUKE TAKAMAKU, ALIAS SAKUSUKE TAKA-
MATSU.**

No. 1305.

PETITION FOR REHEARING.

FILED FEBRUARY 15, 1921.

DECIDED FEBRUARY 16, 1921.

COKE, C. J., KEMP AND EDINGS, JJ.

Per Curiam: On February 5, 1921, we filed an opinion in the above entitled cause dismissing the writ of error for failure on the part of plaintiffs in error to bring up sufficient record to enable us to pass upon the questions raised by the assignments of error. Plaintiffs in error have filed a petition for rehearing. The petition calls to our attention no question of law or fact not already determined by us after full argument.

Except where a decision is in conflict with an express statute or with a controlling decision to which the attention of the court was not drawn a petition for rehearing should show clearly that some question decisive of the case and duly submitted by counsel has been overlooked by the court. *Vierra v. Ropert*, 10 Haw. 343-345, and cases cited.

The petition for rehearing is denied.

C. W. Ashford for the petition.

Syllabus.

ABRAHAM K. KAILI v. INTER-ISLAND STEAM
NAVIGATION COMPANY, LIMITED.

No. 1256.

ERROR TO CIRCUIT COURT FOURTH CIRCUIT.
HON. C. K. QUINN, JUDGE.

ARGUED JANUARY 28, 1921.

DECIDED FEBRUARY 18, 1921.

COKE, C. J., KEMP AND EDINGS, JJ.

TRIAL—nonsuit.

The erroneous denial of a nonsuit for want of sufficient evidence is harmless error where after such denial the defect in plaintiff's proof is supplied by evidence introduced by either party.

PLEADING—amended pleadings.

Under our statute of amendments (Sec. 2371 R. L. 1915) it is proper for the court to allow the plaintiff to amend his complaint after all the evidence is in where the amendment serves to make the pleadings conform to the proof.

CARRIERS—duty to warn passenger of danger—instruction.

In an action for damages for personal injuries by a passenger against the owner of a vessel an instruction to the effect that it was the duty of the officers in charge of the vessel to warn him of any danger which may be apprehended or foreseen with reference to the place of riding, and which fails to tell the jury that there was no duty to warn him if the conditions which constituted the danger were as observable by him and as obvious to him as they were to them, is erroneous.

OPINION OF THE COURT BY KEMP, J.

This is an action for damages for personal injuries brought by the plaintiff Abraham K. Kaili against the Inter-Island Steam Navigation Company, Limited. The injury for which the plaintiff seeks to hold the defendant liable in damages was caused by his right foot being

Opinion of the Court.

caught between the side of the Mauna Kea, the defendant's vessel upon which plaintiff was a passenger, and Kuhio wharf at Hilo, as the vessel was maneuvering to depart. The trial before a jury resulted in a verdict and judgment in favor of plaintiff for \$5000 and the defendant brings the case here upon writ of error.

It is not contended that the verdict is excessive if plaintiff is entitled to recover at all. The injury which he received was quite a severe one, his right foot being crushed and broken as the result of which he was confined in a hospital for more than seven months under the care of a physician and surgeon and suffered great pain and still suffers to some extent. It is also apparent from the testimony of the attending physician that his injury is permanent to the extent that he will always be lame on account of tenderness in the injured foot.

Preliminary to a discussion of the assignments of error it will be well to state as briefly as we may the effect of the pleadings and a general outline of the evidence. The original complaint was drawn upon the theory that the steerage quarters of the vessel were overcrowded and plaintiff compelled thereby, and by the command of the ship's officers to the plaintiff and other steerage passengers as they entered the boat to move back, to take up his position where he did; that the ship was negligently handled by its officers as she was leaving the wharf and that as the result of this negligence the stern of the vessel was brought in contact or collision with the wharf catching plaintiff's foot between the boat and the wharf and crushing it. The defendant answered by general denial and gave notice that it would rely upon the defense of contributory negligence.

At the close of plaintiff's evidence defendant moved for a nonsuit which motion was overruled by the court for the reasons stated, first, "that no grounds for a motion for

Opinion of the Court.

a nonsuit have been specified in the motion,” and second, “for the reason that it is a mixed question of law and fact as to the proximate cause of injury which should be left to the jury under proper instructions from the court.” The defendant did not elect to stand upon its motion for a nonsuit and introduced a mass of evidence at the close of which plaintiff, after introducing a small amount of rebuttal evidence, moved the court for permission to amend his complaint in order to make it conform to the proof. Leave to amend the complaint was granted and the amended complaint contains an additional allegation of negligence to the effect that plaintiff was unaware of the fact that the position and place which he was occupying were dangerous and would and did expose him to the danger of serious injury by the probability of the vessel colliding with the wharf, and while defendant knew that he together with other passengers similarly situated was occupying a dangerous position and that he was exposed to the aforesaid danger yet the defendant failed and neglected to give him sufficient warning of such danger to allow him to obtain a place of safety.

Uncontroverted evidence shows that plaintiff was a steerage passenger on the Mauna Kea, one of defendant's vessels, at the time he was injured; that he together with 189 other draftees of the United States army, was placed on board for transportation from Hilo to Honolulu as a steerage passenger, and that the steerage capacity of the Mauna Kea is fixed by the proper authorities at 190 persons; that the steerage quarters of the Mauna Kea with the exception of the space at and near the stern are enclosed affording no opportunity for a view to the outside; that as soon as plaintiff went aboard he was ordered aft by a ship's officer whereupon he pushed his way through the crowd assembled in the after part of the steerage quarters and seated himself upon the rail of the

Opinion of the Court.

vessel near the stern on the side next the wharf with his feet, or at least one foot, on the outside of the vessel; that the rail where plaintiff was seated was two or three feet above the floor of the steerage and about level with the floor of the wharf so that his foot in the position in which he placed it was between the side of the vessel and the side of the wharf; he being situated on the portion of the vessel where it rounds off to the stern there was a space of four or five feet between the boat at this point and the wharf; that the vessel in leaving the wharf is compelled on account of shallow water or the reef forward of the bow to so maneuver that the bow swings sharply away from the wharf and causes the stern to swing in to the wharf and to almost always come in contact or collision with the wharf as it did upon the occasion in question; that when the stern of the vessel on this occasion swung around toward the wharf plaintiff's foot was caught between the two inflicting the injury of which he complains; that the second mate and several minor employees of the vessel were on the aft-steerage deck in close proximity to plaintiff from the time he took his position on the rail until the happening of the accident; that plaintiff had never traveled on the Mauna Kea or any other steamer except one trip several years before when he traveled from Maui, where he was born, to Hilo on the Mauna Kea; that plaintiff's passage as a steerage passenger called only for deck space and did not include bed or seating facilities. There was evidence from which the jury would be justified in finding that plaintiff did not know or realize that his position was dangerous and that no warning was given him of his danger by either the officers or employees of the defendant or by any one else although it must be conceded that when considered purely from the standpoint of the number of witnesses the preponderance of the evidence is to the effect that plaintiff

Opinion of the Court.

was warned of his danger both by the officers and employees of the defendant and by others.

The first assignment of error is to the refusal of the court to grant defendant's motion for a nonsuit made under the circumstances above stated. As the merits of the assignment must be now considered in the light of the whole record and not as it was when the motion was made, and as the motion was not renewed at the close of the evidence in the same form but was in effect renewed by defendant's request for an instructed verdict, we will discuss the question of the sufficiency of the evidence under that assignment. For authorities to the effect that the erroneous denial of a nonsuit for want of sufficient evidence is harmless error where after such denial the defect in plaintiff's proof is supplied by evidence introduced by either party see *Peacock v. Rothwell*, 18 Haw. 464, 467, and authorities cited. It would therefore be useless to discuss this assignment especially since the same question under all the facts is again presented by other assignments of error.

The second assignment of error complains of the ruling of the court in permitting plaintiff to amend his complaint at the close of the evidence. In this we see no error provided the amendment was justified by the evidence which had been introduced. Under our very liberal statute of amendments (Sec. 2371 R. L. 1915) it was proper for the court to allow the amendment at the time it was offered provided it served to make the pleadings conform to the proof.

The question of the sufficiency of the evidence, as we have already intimated, was raised by defendant's proffered instruction No. 1, which was refused by the court, and is made the subject of an assignment of error. The proffered instruction is as follows:

"The plaintiff has by his own testimony shown that he

Opinion of the Court.

got up on the outside of the rail of the vessel, at its stern, and sat himself with his right foot hanging over the rail down on the outside of the vessel, and that he was seated directly opposite the wharf, and that his foot was below the level of the wharf.

"The defendant is entitled to the legal presumption that the plaintiff was a person of ordinary intelligence and capable of observing whatever might reasonably be apparent to that kind of a person, and, therefore, it had every right to believe that the plaintiff while sitting there would see that the vessel was moving its stern closer to the wharf and that his foot was down between the wharf and the vessel.

"It is also clear that the plaintiff would not have been injured if he had kept his leg inside of the steamer, or if, on the vessel closing in toward the wharf, he had paid ordinary attention to what was going on before his eyes.

"The court therefore instructs you that the plaintiff was guilty of such contributory negligence that his claim in this suit is barred thereby.

"You must therefore bring in a verdict for the defendant in this case. No other verdict would be proper."

Plaintiff's whole theory of his right to recover is contained in three instructions given to the jury by the court at his request, each one of which is made the subject of an assignment of error. These instructions are numbered 3, 4 and 6 and are as follows:

"3. You are further instructed that a carrier of passengers on ships owes to the passenger the duty of protection during transportation in order that, while on the carrier's vessel, he may enjoy safety. This duty of care involves warning of danger so far as such warning may enable the passenger to protect himself against any injury which might be anticipated by the officers of the vessel in the exercise of a high degree of care and foresight, and the carrier will be liable for an injury which might have been avoided if due warning had been given. Thus the officers in charge of a vessel should notify passengers of any danger which may be apprehended or foreseen with reference

Opinion of the Court.

to the place of riding, or of any other peril to which they are subjected; and, where a passenger is in a position rendering him liable to be injured by the vessel striking against the wharf, it is the duty of the officers in charge who have knowledge of the passenger's dangerous position, and that he is oblivious or unconscious of such danger, to warn him thereof."

"4. You are also instructed that while the plaintiff was bound to use care for his own safety, the degree of care required of him was not the highest degree of care or prudence, such as was required of the defendant in the care for the safety of its passengers, nor was it that degree of care that an unusually cautious man or a man of extraordinary prudence would have exercised, but the degree of care expected of the plaintiff was but that degree of care which an ordinarily careful and prudent man would have exercised under similar circumstances. And in this connection you are charged that the fact that plaintiff was so seated that his legs projected beyond the extreme limits of the Mauna Kea, does not necessarily, as a matter of law, render him guilty of contributory negligence or bar him from recovering."

"6. You are further instructed that while as a general rule of law the negligence of a passenger will bar a recovery for injuries sustained by him, if such contributory negligence is the proximate cause of the injury, yet this rule is subject to the doctrine that if the negligence of the passenger is known to the employees of the carrier, and by the exercise of the degree of care required of carriers for the protection of their passengers the injury likely to result from such negligence might have been avoided, then the carrier is liable for the fault of its employees in not avoiding such injury, such fault being deemed the proximate cause thereof, while the negligence of the passenger becomes the remote cause. This rule applies, of course, only when the carrier's opportunity of preventing the injury by the exercise of due care is later in point of time than that of the passenger.

"If therefore you should find that even if the plaintiff was negligent in exposing himself to danger by sitting upon this rail, still if after he got in this situation of dan-

Opinion of the Court.

ger the ship's officers knew his danger and did not give him proper and reasonably sufficient warning and he was reasonably oblivious to the approaching danger, and the injury to the plaintiff resulted from his failure to receive due warning, then the negligence of the ship's employees in failing to give such warning is in law regarded as the last negligence that caused the injury, and the plaintiff's prior negligence will not prevent a recovery by him, and your verdict must be for the plaintiff."

From the foregoing it will be seen that the plaintiff in submitting his case abandoned his original claim that the defendant was negligent in maneuvering its vessel and relied entirely upon the claim set up in his amendment that it was negligent in failing to warn him of the danger of his position. Sufficient facts were shown to authorize the submission of the case to the jury on this theory, under proper instructions, hence the defendant's first instruction which would have instructed a verdict in its favor was properly refused. In order to have justified this instruction it must have appeared by the uncontroverted evidence that the conditions which created the danger to which plaintiff's voluntary act of seating himself upon the rail of the vessel exposed him were as observable and obvious to him as they were to the officers and employees of the defendant. We cannot say as a matter of law that this was so but it was for the jury to say under the facts submitted whether the conditions which rendered his position dangerous were as apparent to him as to them. We think, however, the court failed to appreciate this element of the case in passing upon the instructions to the jury in behalf of plaintiff and assumed that these conditions were not as apparent to him as they were to defendant's officers and employees instead of including this as an element to be found by it from the evidence as a prerequisite to plaintiff's right to recover. By instruction No. 3 given at plaintiff's request the jury was

Opinion of the Court.

told in effect that if the plaintiff by seating himself upon the rail of the vessel exposed himself to a danger which defendant's officers might by the exercise of proper care have anticipated and failed to warn him plaintiff was entitled to recover without informing it that if the conditions which rendered his position dangerous were as obvious to him as to them there was no duty on their part to warn him. The law which we have attempted to set forth above is to be found in 10 C. J. p. 910, the authority cited by plaintiff in support of his instruction No. 3. This instruction follows the text closely as far as it goes, but to our mind the failure to include this additional element renders it fatally defective. Whether this instruction would have been cured by giving an additional instruction containing this element we need not consider since no such instruction was given.

We have set out above all of the instructions given in behalf of plaintiff which undertake in any way to define his right to recover. Numerous instructions were given in behalf of defendant, some of which in our opinion should not have been given, and others which were requested were refused. While we are unable to say that any of the instructions requested by defendant and refused should have been given in the form in which they were offered yet we think instruction No. 16, requested by defendant and refused, sufficiently called to the attention of the court the proposition of law which we have set forth above.

For the errors pointed out the judgment must be reversed and the cause remanded to the circuit court for a new trial and it is so ordered.

J. W. Russell (*Russell & Patterson* on the brief) for plaintiff.

L. J. Warren (*Smith, Warren & Stanley* on the brief) for defendant.

Syllabus.

**WILLIAM R. CASTLE, LORRIN A. THURSTON AND
ALFRED L. CASTLE, TRUSTEES UNDER THE
WILL OF JAMES B. CASTLE, DECEASED, v.
HARRY IRWIN, ATTORNEY GENERAL OF THE
TERRITORY OF HAWAII, TITUS M. COAN OF
NEW YORK, STATE OF NEW YORK, AND HAR-
OLD K. L. CASTLE.**

No. 1303.

APPEAL FROM CIRCUIT JUDGE FIRST CIRCUIT.

HON. J. J. BANKS, JUDGE.

ARGUED FEBRUARY 9, 10, 12, 1921.

DECIDED FEBRUARY 25, 1921.

COKE, C. J., KEMP AND EDINGS, JJ.

APPEAL AND ERROR—*party not appealing not to be heard.*

It is elementary that where a party to a suit does not appeal from the decree entered therein he must be held to acquiesce in it and cannot be permitted to ride into an appellate court upon the appeal of another party to the suit, except that under certain circumstances not existing in this cause a nonappealing party may be heard in the appellate court on the appeal of another by virtue of Act 45 S. L. 1919.

SAME—*trustees' right of appeal.*

It is the general rule that executors, administrators and trustees are in their official capacity indifferent persons as between the real parties in interest and they cannot litigate the interest of one of such parties as against the other at the expense of the estate.

SAME—*appealing party must have interest.*

A party to a suit cannot appeal from a judgment or decree if he is not thereby affected. While section 2508 R. L. 1915 is extremely broad it requires that the appellant in order to entitle him to prosecute an appeal must be aggrieved by the judgment or decree complained of.

OPINION OF THE COURT BY COKE, C. J.

James B. Castle, late of Honolulu, Territory of Ha-

Opinion of the Court.

waii, died intestate at Honolulu in April 1918 leaving an estate of the approximate value of \$500,000. His will was thereafter duly admitted to probate. By the terms of the will Julia White Castle, his widow, was provided a substantial annuity and upon her death an annual income of not less than \$5000 nor more than \$40,000 was to be paid to Harold K. L. Castle, the son of the deceased, and an annuity of \$600 was directed to be paid to Titus M. Coan, a resident of New York City. The will provides that after these requirements have been satisfied the income from the estate is to be devoted to establishing and maintaining a coeducational boarding school. The widow waived her rights under the will and elected to take dower and is not now interested in the residue of the estate. The son Harold K. L. Castle has entered into an agreement with the trustees of the estate by which he is to be paid a lump sum of money in lieu of all interest which he may have in the estate. The amount to be paid under this agreement depends upon whether or not the annuity provided for Harold under the will has been accelerated by reason of the election of his mother to take dower. That is to say, if acceleration has taken place, he will receive under the compromise agreement the sum of \$183,165.53, and if acceleration has not taken place he will receive \$103,235.68.

In order to obtain a judicial approval of this compromise agreement and further to have a construction of certain provisions of the will of Mr. Castle the trustees instituted a suit in equity in the court below, the respondents being Harry Irwin, Esq., attorney general of the Territory, representing the public interests involved in the estate; Titus M. Coan, the annuitant, and Harold K. L. Castle, the son of the decedent. At the conclusion of the hearing a decree was entered by the judge of the circuit court sitting in equity approving the compromise

Opinion of the Court.

agreement between the trustees and Harold K. L. Castle, and it was by said decree held that Harold K. L. Castle's annuity was accelerated by the election of said Julia White Castle, widow of testator, to take dower in the estate of the testator and that the said trustees should therefore pay to said Harold K. L. Castle the sum of \$183,165.53 under said compromise agreement in full settlement of all his rights and interests in said estate. From this decree Titus M. Coan, the annuitant, through his counsel has perfected an appeal to this court. Upon this appeal of the respondent Coan the trustees by their counsel have assumed the right to appear in opposition to the decree appealed from. Counsel for Harold K. L. Castle urged that the decree should be sustained. The attorney general of the Territory has made no appearance except to communicate to the court his approval of the decree entered by the court below. At the argument it was suggested by the court that the trustees not having appealed from the decree below are not entitled to be heard and that as it appears from the record that the interests of Titus M. Coan are not and cannot be jeopardized to any substantial extent by reason of the decree he should not be heard to complain of it.

After argument upon the questions thus presented we conclude that the trustees have no right to be heard. This same question was considered by the Supreme Court of the United States in *Fitchie v. Brown*, 211 U. S. 321, 329, where because the executors had taken no appeal from the decree the court said: "We are of the opinion that counsel for the executors had no right to appear and be heard against the decree, no appeal having been taken from it by his clients." We think it is elementary that where a party to a suit does not appeal from the decree entered therein he must be held to acquiesce in it and cannot be permitted to ride into an appellate court upon

Opinion of the Court.

the appeal of some other party to the suit, except that under certain circumstances not existing in this cause a nonappealing party may be heard in the appellate court on the appeal of another by virtue of act 45 S. L. 1919.

Counsel for the trustees have moved the court for permission to perfect their appeal and have filed a motion for the issuance of a writ of certiorari directing the clerk of the court below to transmit here "the appeal and notice of appeal of said petitioners filed in said circuit court November 26th, 1920." Mr. Withington, of counsel for the trustees, stated at the outset of his argument that the trustees had not appealed from the decree of the court below because their position being neutral they had no appealable interest in the controversy. While not deciding the question we are free to say that there appears to be much force in counsels' position for it is the general rule that executors, administrators and trustees are in their official capacity indifferent persons as between the real parties in interest. The funds which come into their hands are held in *custodia legis* to be distributed by the court to those who show themselves entitled to them and it is their duty to distribute the money coming into their hands as the court shall direct. Applying this rule to an executor who attempted to appeal from the decree of the superior court the supreme court of California in *Estate of Marrey*, 65 Cal. 287, speaking through Mr. Justice McKinstry, said: "The appeal of the executor from the decree of settlement and disposition must be dismissed. He cannot in any case litigate the claim of one legatee as against the others at the expense of the estate." In the present case all the beneficiaries under the will except Titus M. Coan are satisfied with the decree of the court below, and the right of the trustees to prosecute an appeal at the expense of the estate is, to say the least, doubtful.

Opinion of the Court.

See also *Bryant v. Thompson*, 128 N. Y. App. 426. In the New York case the trustees under the will of Francis W. Tracy brought an action for the construction of the will and asked the court to determine which of two parties was entitled to certain funds in plaintiffs' hands as trustees. The judgment rendered decided the question and this was acquiesced in by both of the alleged claimants to the funds who were parties and were of age. The court held that under the law of New York the right to appeal is limited to a party aggrieved and as plaintiffs were not aggrieved by the judgment they were not entitled to appeal.

The supreme court of Hawaii in *Haw'n Trust Co. v. Holt*, 24 Haw. 212, recognized and applied the well known rule to the effect that a party to a suit cannot appeal from a judgment or decree if he is not thereby affected. See also *Virden v. Hubbard*, 37 Colo. 37; *Goldtree v. Thompson*, 83 Cal. 420. It is true that our local supreme court in *Haw'n Trust Co. v. Galbraith*, 22 Haw. 78, sanctioned the right of the trustees to appeal, but in that case the trustees had a personal pecuniary interest in the decree of the court from which the appeal was taken. But even if it be conceded that the trustees of the Castle estate had the right of appeal from the decree of the lower court that right has long since been lost to them by reason of their failure to perfect an appeal. From the record before us it appears that the sole step taken by them following the entry of the decree was merely to file with the clerk of the circuit court a notice of appeal. They neither paid the costs, filed a bond nor made the slightest effort to bring to this court the record or any part thereof. As pointed out in the early case *In the Matter of the Petition of Oopa*, 3 Haw. 407, there is a material distinction between an appeal and a notice of appeal. The one refers to an appeal complete in itself, the other to an appeal to

Opinion of the Court.

be perfected at some future time. And it was further held in that case that the steps required by statute for taking an appeal must be taken within the prescribed time or the appeal will be ineffective. This rule was approved in *Correa v. Felipe*, 24 Haw. 672.

Counsel for the trustees do not offer any excuse whatsoever for their failure to perfect their appeal within the time and in the manner provided by law. We cannot believe that counsel are unfamiliar with the plain and obvious requirements of our statutes of appeal and if this be granted the failure to perfect their appeal within the time and in the manner specified was either due to inexcusable neglect or to an abandonment of their intention to appeal after having filed their notice. But whatever the reason for their inaction they have no right to expect relief at the hands of this court. Their motion for a writ of certiorari is an innovation in this jurisdiction. That this common law writ may properly be invoked to perfect the appeal of a party in default under our statutes presents a doctrine as novel as it is untenable.

Referring now to the status of Titus M. Coan we find from the record that his interest in the estate goes only to the extent of having paid to him during his life time his annuity of \$600. The record discloses that on April 7, 1920, the trustees had in their hands funds of the estate amounting to \$483,041.71, and that there was an additional \$75,000, a part, if not all, of which would probably be paid to them at a subsequent time. Under the will the first claim upon this fund after settlement with the widow was that of Titus M. Coan and it clearly appears that the interests of Coan cannot be in the least jeopardized by the payment to Harold K. L. Castle of the sum of \$183,165.53 instead of the sum of \$103,235.68, for in either event a fund of not less than \$300,000 will remain in the hands of the trustees to meet the \$600

Opinion of the Court.

annuity of Coan. The language of our statute, that is, section 2508 R. L. 1915, is extremely broad and permits appeals from all decisions, judgments, orders or decrees of circuit judges at chambers to the supreme court except in cases where the appellant is entitled to appeal to a jury. But the language of this statute should be held, in order to make sense of it, to require that the appellant in order to entitle him to prosecute an appeal must be aggrieved by the judgment or decree complained of. Only persons who have substantial grievances, that is to say, who are affected or prejudiced by the judgment or decree, ought to be heard in the appellate court. Judicial tribunals sit only for the determination of real controversies between parties who have a legal interest of at least technical sufficiency in the subject-matters embraced in the records of causes pending in courts. Merely abstract or moot questions will not be determined on appeal and feigned or fictitious appeals ought not to be tolerated. We do not hold that Coan is without a technical legal right to appeal yet his annuity is so obviously and completely protected, irrespective of whether the decree of the court below is affirmed or reversed, and his actual interest in the controversy is of such a remote and evanescent character as to occasion surprise that he should be here prosecuting this appeal. *Haw'n Trust Co. v. Holt, supra; Estate of Brown*, 25 Haw. 327; *Cowherd v. Kitchen*, 77 N. W. 1107. In dealing with the same estate we recently held that the election of the widow to take her dower operated to accelerate the provision in the will in favor of Harold K. L. Castle and to make his annuity an immediate charge upon the estate. See *Estate of Castle*, 25 Haw. 108. In the decree herein appealed from the court below with entire propriety followed the opinion of this court.

Under the circumstances above outlined the motions

Syllabus.

interposed by the trustees should be denied, and as to Titus M. Coan the decree appealed from should be affirmed and it is so ordered.

A. Withington and *A. L. Castle* (*Robertson, Castle & Olson* on the brief) for petitioners.

Marguerite K. Ashford for respondent Titus M. Coan.

R. B. Anderson and *U. E. Wild* (*Frear, Prosser, Anderson & Marx* on the brief) for respondent H. K. L. Castle.

MARY GOMES v. MANUEL GOMES.

No. 1318.

MOTION FOR ALLOWANCE OF ATTORNEY'S FEES.

ARGUED FEBRUARY 17, 1921.

DECIDED MARCH 2, 1921.

COKE, C. J., KEMP AND EDINGS, JJ.

DIVORCE—*attorney's fee on appeal—allowance by supreme court.*

This court has incident to its appellate jurisdiction in matters of divorce and separation the authority after an appeal has been perfected to require the husband in a proper case to advance to the wife a sum sufficient to put her on an equality with him in the matter of employing counsel to represent her on appeal.

SAME—*same—application of Sec. 2935 R. L. 1915.*

Sec. 2935 R. L. 1915 deals only with the authority of circuit judges at chambers to grant alimony and expenses of trial and is neither a grant of authority to, nor a limitation upon the authority of, this court to allow the wife an attorney's fee after the cause reaches this court on appeal.

SAME—*same—principles governing allowance.*

The principles of the common law govern this court in determining whether or not in a given case the wife is entitled to an allowance to enable her to employ counsel to represent her on appeal.

OPINION OF THE COURT BY KEMP, J.

Mrs. Mary Gomes brought suit against her husband Manuel Gomes for separation from bed and board forever, for custody of their minor children and for alimony, etc. At the conclusion of the hearing the circuit judge filed his decision favorable to the libellant on her claim for separation and appointed a master for the purpose of ascertaining and reporting to him the financial standing and condition of the libellee and his ability to pay either alimony in gross or in periodical payments, or partly in gross and partly in periodical payments. After the report by the commissioner a decree was entered granting the libellant all the relief asked and the libellee has perfected an appeal to this court. After the appeal was perfected the libellant filed a motion in this court for an order directing the libellee to forthwith pay to her attorney a reasonable attorney's fee for services to be performed by him in the matter of the appeal now pending. The motion is resisted, the contention being that this court is without authority in any event to award the libellant attorney's fees and if this is not so she has not shown herself to be in destitute circumstances and therefore not entitled to relief under the statute. We have no statute authorizing in express terms this court, or any court or judge for that matter, to require a husband in divorce or separation proceedings to supply his wife with funds to enable her to employ an attorney to represent her on appeal. The only statute which deals with anything akin to the subject is section 2935 R. L. 1915, which provides:

“Whenever it shall be made to appear to the judge after the filing of any libel, that the wife is under restraint or in destitute circumstances, the judge may pass such orders to secure her personal liberty and reasonable support, pending the libel, as law and justice may require, and may enforce such orders by summary process. The judge may also compel the husband to advance reasonable amounts for the compensation of witnesses and other rea-

Opinion of the Court.

sonable expenses of trial to be incurred by the wife. The judge may revise and amend such orders from time to time."

It seems too clear to permit of argument that the above statute deals only with the authority of circuit judges at chambers to grant temporary alimony and expenses of trial and is neither a grant of authority to, nor a limitation upon the authority of, this court to deal with that subject. Our statute (Sec. 2272 R. L. 1915) confers jurisdiction upon circuit judges at chambers to hear and determine all matters of divorce, separation and annulment of marriage, and section 2508 R. L. 1915, with certain exceptions not necessary to notice, allows appeals from all decisions, judgments, orders or decrees of circuit judges at chambers to the supreme court. No other statutory provisions have any bearing upon the question of the jurisdiction of this court in matters of divorce and separation. It is therefore clear that if we have jurisdiction to entertain the motion under consideration it is by virtue of a power or authority incident to our appellate jurisdiction and not by virtue of any statutory provision directly conferring such jurisdiction upon us.

Whether this statute does or does not authorize the circuit judge before whom a libel for divorce or separation is pending to require the husband in a proper case to advance to the wife the amount necessary to enable her to employ suitable counsel to represent her on appeal we need not decide for the question is not before us, but we have no doubt of the inherent power of this court to require him to do so. Counsel is as necessary on appeal as in the earlier stages of the litigation and if the wife can have no allowance to enable her to employ counsel to represent her in resisting the husband's appeal she may be deprived of the right to appear on an equality with her husband. Natural justice and the policy of the law

Opinion of the Court.

alike demand that in any litigation between the husband and wife they shall have equal facilities for presenting their case before the tribunal. This requires that they shall have equal command of funds—so that, if she is without means, the husband being usually in possession of the purse strings, he should be compelled to furnish them to her to an extent rendering her his equal in the suit. In Iowa, where the statute provides that “The court may order either party to pay the clerk a sum of money for the separate support and maintenance of the adverse party and the children and to enable such party to prosecute or defend the action,” it was held to be a fair presumption that the legislature intended to give the trial court control over the matter only while the litigation was pending before it and that the appellate court has the right to protect its jurisdiction on appeal by ordering the payment of suit money for prosecuting or defending on appeal and that the appellate tribunal is the only one to make such allowance. (*Shors v. Shors*, 110 N. W. 16, 18; *Lewis v. Lewis*, 116 N. W. 698; *Mengel v. Mengel*, 138 N. W. 495, 500.) In *Goldsmith v. Goldsmith*, 6 Mich. 285, the wife applied to the supreme court after the case reached there on appeal for temporary alimony and an allowance to enable her to prosecute her appeal. It was contended that the supreme court had no power to make an allowance but is only empowered by statute to review the case upon the proceedings and decree appealed from. In answer to this contention the court said: “The power to allow temporary alimony pending proceedings for a divorce and to compel the husband to furnish the wife with pecuniary means to defend or prosecute the suit on her behalf is incident to divorce cases. It is necessary to the ends of justice. Without this power in the court the wife that should have no separate property of her own would be without the requisite means of

Opinion of the Court.

prosecuting or defending the suit and of supporting herself in the meantime. The statute relative to divorces says: 'The court may, in its discretion, require the husband to pay any sum necessary to enable the wife to carry on or defend the suit during its pendency,' but makes no mention of temporary alimony. So far as the statute goes, it is only confirmatory of the common law, which had been acted upon by our courts before we had any statutory provisions on the subject." See also *Hunt v. Hunt*, 100 Pac. 541; *Spradling v. Spradling*, 158 Pac. 900; *Pleyte v. Pleyte*, 15 Colo. 125; *Ex parte Farrell*, 71 So. 462, and 19 C. J. p. 232, Sec. 547.

From what has gone before we conclude that this court has incident to the exercise of its appellate jurisdiction in matters of divorce and separation the authority after an appeal has been perfected to require the husband in a proper case to advance to the wife a sum sufficient to put her on an equality with him in the matter of employing counsel to represent her on appeal. It only remains to determine whether this is a proper case for ordering such an allowance and if so the amount to be allowed.

From the report of the master appointed by the circuit judge to ascertain the financial condition and standing of the parties and from the affidavits on file before us it appears that the wife is the owner of real estate of the value of \$5000 or \$6000 on which there are two houses and in one of which she and her children reside; that the other house on said premises is not rented and is in such a dilapidated condition that it probably cannot be rented although the libellee says in his affidavit that it can be rented for \$15 per month; that she has no other property of any salable value and no money whatsoever with which to pay her attorney for the services necessary to be rendered by him in opposing the appeal and no

Opinion of the Court.

income from any source sufficient to enable her to live and support her children and make such payment. Counsel for appellant contend that under this state of facts the appellee is not a proper subject for the relief asked and cite *Nobrega v. Nobrega*, 13 Haw. 654, and *Vivas v. Kauhimahu*, 19 Haw. 463, in support of their contention.

In the *Nobrega* case the circuit judge ordered the husband to pay the costs and the sum of \$300 to the wife for her attorney's fee and to pay her the sum of \$15 per week as temporary alimony until the execution of the deed for the property, which he had been ordered to execute, or until the further order of court. The husband appealed and this court, discussing that portion of the decree or order above referred to, said: "The court was also in error in making the order for the payment of \$15.00 per week as temporary alimony. This order can only be sustained on the theory that the libellant was in 'destitute circumstances.' (Section 1938, Civil Laws.) The court found that the libellant owns in fee real estate of the value of \$3,500 or \$4,000; such a person cannot be said to be in 'destitute circumstances' and unable to support herself pending the litigation in this case." The opinion concludes with the following: "The exceptions are sustained and the decree allowing temporary alimony and dividing the real estate is reversed and the cause remanded to the circuit court with direction to make to libellant such suitable allowance as the court shall deem just and reasonable and for such further proceedings, consistent with the foregoing opinion, as may be necessary." It is to be noted that the decree of divorce and the order requiring the libellee to pay to the libellant \$300 for her attorney's fee was not reversed, indicating that the court took the view that the statutory provision requiring the wife to be in destitute circumstances applies to temporary alimony but not to her attorney's fees.

Opinion of the Court.

In *Vivas v. Kauhimahu*, *supra*, the plaintiff, an attorney at law, brought suit before a district magistrate against the husband of a woman he had represented in an appeal of a divorce case to recover \$100 on a *quantum meruit* for said professional services. A demurrer on the grounds that the complaint did not state a cause of action and showed that the court had no jurisdiction was sustained on both grounds and the plaintiff appealed to the supreme court on the points of law involved in sustaining the demurrer. Held, that the demurrer was properly sustained. In discussing the demurrer the court said: "There is nothing in the complaint which shows that in attending to the appeal the plaintiffs gave credit to the husband or that the wife had not means of her own to pay for their services or that she requested them to represent her on appeal. The court in which the libel is brought has discretionary power to require the husband to furnish means to engage counsel for the wife in defending a libel suit for divorce when 'it shall be made to appear to the judge after the filing of the libel' that the wife is in 'destitute circumstances.' (Sec. 2236 R. L.) A refusal of a judge to compel the husband to advance counsel fees as one of the 'reasonable expenses of trial to be incurred by the wife' would not be reversible on appeal unless it was shown that the refusal was arbitrary, nor would such refusal justify another court in taking jurisdiction of an action by counsel to recover for services rendered unless on the theory that counsel had a right to require the husband's payment for his services, whatever the wife's pecuniary or other circumstances might be."

We do not question the correctness of the ultimate holding in either of the cases discussed but it must be kept in mind that in both cases the court was considering the circumstances under which the circuit judge is empowered to pass such an order, the question being directly

Opinion of the Court.

involved in the *Nobrega* case and only incidentally involved in the *Vivas* case. In the *Nobrega* case the court by not reversing the order for the payment of attorney's fees must have concluded that the requirement that the wife be in destitute circumstances applies only to the allowance of temporary alimony and not to the allowance of reasonable expenses of trial for in that case the wife owned real estate valued at \$3500 or \$4000. In the *Vivas* case the basis of the decision was that the husband is not liable at law for the fee of an attorney for defending his wife in a libel for divorce and the application of the statute authorizing circuit judges to order such payment was not involved in that question. So if it should be admitted that the statute would govern this court so far as it sets forth the circumstances under which the order will be passed we do not think the language used by the court in the *Vivas* case by way of argument would overcome the effect of the action of the court in the *Nobrega* case where the matter was directly involved. But as we have already said we do not think the statute imposes a limitation upon our power to pass the order. We are therefore compelled to look to the unwritten law for the principles which should guide us in the matter.

Whether counsel fees should be allowed a wife, and if so, what the amount should be, is affected by the wife's necessity, and the burden is on her to show the existence of facts which will justify the court in making such an allowance. If she has sufficient means to enable her properly to prosecute or defend her action counsel fees will not be allowed, but if she is without sufficient means, the court may allow her counsel fees, having regard to the financial ability of the husband in doing so. It has been held that the capital of the wife's separate estate need not be resorted to by her in prosecuting or defending her action against her husband but that it is the income from

Opinion of the Court.

the estate that determines her necessity. It has also been held that she ought not to be required to encumber her real estate in order to procure means to pay her attorney. (19 C. J. 235-6 and cases cited.) But we think by the weight of authority the rule is not as broad as here stated. If the wife's capital consists of money on hand or in bank and is sufficient to enable her to support herself and pay her attorney few courts would be found willing to compel her husband to pay such fees for her. Likewise, if she possessed ample real estate outside of her home, although not producing an income at the time, she would not have shown her necessity and the fee would not be allowed. But where, as in this case, the only real estate owned by the wife is her home in the city, from which no income is derived although shown to be of considerable value, we think she is not thereby deprived of the right to have her husband advance her fees necessary to be expended in defense of his appeal. But the husband's financial ability also is of importance on the question of the wife's claim for counsel fees. The husband's ability to respond coupled with the wife's need will ordinarily be sufficient to warrant the passing of the order. In this case it is shown that the only real estate owned by the husband is that which he is ordered to convey to his wife by the decree from which he is prosecuting this appeal. It should therefore not be taken into account. In addition he owns a transfer business in a more or less run down condition, in connection with which he has automobiles and trucks worth \$4200, open accounts of the face value of about \$5000, one-half of which he says are uncollectable and which the master who investigated his affairs says are reasonably collectable. At the time of the master's investigation, October 1920, he had over \$1400 in bank, a liberty bond for \$100 and a leasehold reported to be worth \$1000 and no incumbrance on any of this property.

Syllabus.

By his affidavit filed in this proceeding the above property is now shown to be mortgaged for \$2000 and the bank account wiped out. It also appears that libellee is now paying the libellant \$20 per week for the support of herself and children without any order of court and also paid her attorney \$100 as his fee in the trial below. According to the master's report the \$20 per week is only about one-half of the amount necessary for the support of herself and children.

Under all the circumstances brought to our attention we think the libellant has sufficiently shown her necessity and the libellee's ability to respond in some amount but we do not think, in view of his financial condition, he should be required to pay more than \$250.

Upon presentation of a proper draft thereof an order will be entered requiring the libellee to pay the libellant the sum of \$250 for her counsel fees in this appeal.

W. B. Lymer for the motion.

J. W. Cathcart contra.

TERRITORY *v.* T. HIROTA.

No. 1300.

EXCEPTIONS FROM CIRCUIT COURT FIRST CIRCUIT.

HON. J. J. BANKS, JUDGE.

ARGUED FEBRUARY 25, 1921.

DECIDED MARCH 4, 1921.

COKE, C. J., KEMP AND EDINGS, JJ.

CRIMINAL LAW—*taking fish with nets.*

There is no statutory inhibition against the use of a twine net, seine or trap to take fish in the waters of Hawaii provided the mesh or opening of the net be not less than one inch square. Food fish may not, however, be taken by means of any wire fence, wire net or wire obstruction.

OPINION OF THE COURT BY COKE, C. J.

The defendant-appellant, T. Hirota, was tried and convicted in the circuit court of the first judicial circuit for an alleged violation of the provisions of section 628 R. L. 1915 as amended by Act 84 S. L. 1919 and comes to this court on a bill of exceptions. The statute under which the defendant was prosecuted reads as follows:

“No person shall take, catch or kill any fish fit for food living in the waters of any sea, harbor, bay, inlet, or stream within the jurisdiction of the Territory of Hawaii, by means of any net, seine, trap or other contrivance of whatsoever kind or description having a smaller mesh or opening than two inches stretched or one inch square, or by means of any wire fence, wire net, or wire obstruction of any size, material, or description whatsoever.” (Act 84 S. L. 1919.)

The facts are very simple and are not in dispute, and while a number of exceptions are brought here by defendant alleging error in the proceedings in the court below there is really but one question involved, that is to say, Did the defendant by means of a wire fence, wire net or wire obstruction take the fish described in the charge against him.

From the record before us it appears that the defendant constructed and operated a fish trap in the waters of the sea between the shore and reef at Makua, district of Waianae, Island of Oahu, in which he trapped and took various food fishes, principally ulua, opelu, awa, kala and oio. The trap consisted of a net extending from the shore and at right angles therewith for a distance of about 900 feet which was suspended from a small wire cable and at the outer end of which was a box-shaped net enclosure with an opening at the point of contact with the net. The net and box were constructed of cotton twine of two inch mesh. The box was about 180 feet in length by 100 feet in breadth. There were three wires attached to and stretched across the main cable and four of such cables

Opinion of the Court.

were attached to and stretched across the box. These cables were anchored at each end and were for the purpose of holding the net in place. The cables and top of the net and box were kept at the surface of the water by wooden floats while the lower edges of the netting were held to the bottom of the sea by the means of lead sinkers. The water at this point was of the approximate depth of ten feet. The fish in passing parallel to the shore would come in contact with the net and in following along this course would be led into the box. Aside from the cable extending from the shore and the cross cables above referred to no other wire of any description was utilized in the means employed by the defendant to take the fish and unless it can be held that these wires constituted a wire fence, a wire net or a wire obstruction the defendant is guilty of no violation of the statute in question.

The wire cables stretched from the shore along the surface of the water and the cross cables were used solely to hold the net and trap stationary. It was the cotton twine net suspended from the cable and not the cable itself which formed the obstruction and by means of which the fish were caused to pass into the trap. There is no statutory inhibition against the use of a twine net, seine or trap to take fish provided the mesh or opening thereof be not less than one inch square, and the mesh of the net used by the defendant exceeded that dimension.

We conclude therefore that the verdict of the jury herein was contrary to the law and the evidence and that defendant's exception thereto should be sustained.

The verdict and sentence herein are vacated and set aside and the cause is remanded to the circuit court for further proceedings consistent with this opinion.

H. E. Stafford, Third Deputy City and County Attorney (*W. H. Heen*, City and County Attorney, with him on the brief) for the Territory.

P. L. Wearer for defendant.

Syllabus.

M. KAHUE v. KAHUE PALAUALELO, AND JOE CARILLO, AS GUARDIAN AD LITEM FOR LUKA CARILLO, A MINOR.

No. 1309.

MOTION TO DISMISS APPEAL.

SUBMITTED FEBRUARY 24, 1921.

DECIDED MARCH 8, 1921.

COKE, C. J., KEMP AND EDINGS, JJ.

APPEAL AND ERROR—*order overruling motion to open default—interlocutory appeal.*

A party may not as a matter of right appeal from an order refusing to grant a motion to open default.

SAME—*same—same.*

An appeal from an interlocutory order must be allowed by the judge of the circuit court as provided for in Sec. 2508 R. L. 1915, and in the absence of such allowance the appeal will be dismissed on motion.

OPINION OF THE COURT BY COKE, C. J.

The petitioner-appellee instituted in the circuit court of the second judicial circuit a suit in equity to cancel a deed. The respondent-appellant, although duly served with process, failed to answer within the prescribed time and upon motion of the petitioner an order was made by the circuit judge declaring him in default. Subsequently the appellant interposed a motion supported by affidavits to open the default. From the decision denying the motion the appellant has appealed to this court. The petitioner now presents a motion to dismiss the appeal on the ground "that this court has no jurisdiction to hear and determine said cause in that the consent of the trial court not having been first obtained there is no valid appeal from the interlocutory decision of the trial court."

Where a respondent duly served with process in an

Opinion of the Court.

equity suit fails, within the time required, to demur, plead or answer the usual and recognized method of procedure is for the petitioner to make application for a decree *pro confesso* and not as in law cases for an order of default. Whether that proceeding has been abolished by virtue of the language to be found in the last paragraph of section 2361 R. L. 1915 it is unnecessary for us to decide for in any event the motion must be granted.

The order denying the motion to open the default was clearly interlocutory and an appeal therefrom could not be prosecuted unless the same was allowed by the circuit judge as provided for in section 2508 R. L. 1915. In the present case the appeal has not been allowed by the judge of the circuit court hence the appellant has no standing here. A party may not as a matter of right appeal from an order refusing to grant a motion to open default or refusing to set aside a judgment by default. 6 Ency. Pl. & Pr. 231; *Hitchcock v. Superior Court*, 73 Cal. 295; *Schlotfeldt v. Bull*, 43 Pac. 33. In *Bond v. Haw'n Gazette Co.*, 22 Haw. 60, an interlocutory exception was taken and allowed from the denial of a motion to open and set aside a default. This was in conformity with our statute and in harmony with the recognized rules of appellate procedure, at least so far as law cases are concerned.

The appellant will of course have an opportunity to present the matters now complained of to this court by appeal or error should the final decree herein be adverse to him.

The motion to dismiss the appeal is granted.

E. Vincent and *J. W. Kalua* for the motion.

Wendell F. Crockett and *E. R. Berins* contra.

Syllabus.

WILLIAM R. CASTLE, LORRIN A. THURSTON AND ALFRED L. CASTLE, TRUSTEES UNDER THE WILL OF JAMES B. CASTLE, DECEASED, v. HARRY IRWIN, ATTORNEY GENERAL OF THE TERRITORY OF HAWAII, TITUS M. COAN OF NEW YORK, STATE OF NEW YORK, AND HAROLD K. L. CASTLE.

No. 1303.

PETITION FOR REHEARING.

FILED FEBRUARY 28, 1921.

DECIDED MARCH 11, 1921.

COKE, C. J., KEMP AND EDINGS, JJ.

APPEAL AND ERROR—*party appealing must have interest.*

The appellate jurisdiction of this court can only be invoked by a party aggrieved by the decision, judgment, order or decree appealed from.

SAME—*same*—*Act 45 S. L. 1919 construed and applied.*

Act 45 S. L. 1919 provides that "In case the decision, judgment, order or decree sought to be reviewed was rendered against two or more persons * * * all such cases shall be determined as if all such persons had joined in the appeal;" but where the decree appealed from is not against one of the parties he cannot prosecute an appeal nor will he be permitted to be heard upon the appeal of some other party against whom the decree was rendered.

TRUSTS—*attitude of trustees in controversy between real parties in interest.*

The trustees should occupy a neutral and indifferent attitude in any controversy between the real parties in interest and clearly they ought not to be allowed to litigate the claim of one such interested party as against another such party.

SAME—*duty to protect estate.*

If the estate itself as an entity is attacked it would be the duty of the trustees to defend and if such defense requires that an appeal be prosecuted it would be their right and duty to prosecute the appeal.

Opinion of the Court.

SAME—*same*.

So if the interests of the estate require the bringing of a suit such suit should be brought by the trustees and in the event of an unfavorable judgment the trustees should appeal therefrom if such appeal would be proper to protect the interests of the estate.

SAME—*same*.

But with controversies which affect the individual interests alone of those who may be interested in their trust the trustees have nothing to do and consequently cannot be aggrieved by a decree which affects only those individual interests.

OPINION OF THE COURT BY COKE, C. J.

The petitioners W. R. Castle, Lorrin A. Thurston and Alfred L. Castle, trustees under the will of James B. Castle, deceased, have interposed a motion for a rehearing of the above entitled cause. The petition is based upon two specific grounds, namely, "That there is error in declaring that the petitioners are not entitled to be heard in the supreme court in that Act 45, Session Laws of Hawaii, 1919, expressly provides that the petitioners shall have a right to be heard," etc., and "That there was error in holding that there was only a moot question to be decided in that there is a question to be decided as to the proper disposition of eighty thousand dollars of public money." It may be said at the outset that petitioners are in error in assuming that in our former opinion we held that there was only a moot question involved or that there was any moot question at all involved in the case. We held that the trustees were not before this court and therefore had no right to be heard, and as to Coan we held that he had a technical right of appeal which gave us jurisdiction and which jurisdiction was exercised by affirming the decree from which Coan had prosecuted his appeal. Had we concluded that there was only a moot question involved or that Coan's appeal was feigned or fictitious his appeal

Opinion of the Court.

would have been dismissed without further consideration. The trustees now for the first time urge the claim that they are, and all along have been, properly before this court as appellants upon the appeal of Coan by virtue of Act 45 S. L. 1919. This attitude on their part is entirely inconsistent with their motion made in open court at the argument of the cause for permission to perfect their appeal and their subsequent motion for a writ of certiorari directing the clerk of the lower court to perfect their appeal for them. If they were in fact and in law properly before this court as appellants on the appeal of Coan what then was the purpose of their motion and their petition for the writ of certiorari? Act 45 *supra* is in part as follows:

“In case the decision, judgment, order or decree sought to be reviewed was rendered against two or more persons either or any of such persons may appeal therefrom, and for that purpose shall be permitted to use the names of all such persons. The appellant shall serve those of such persons who have not joined in the appeal and who can be found within the Territory, with a copy of the notice of appeal. Such persons shall be entitled to be heard in the supreme court. All such cases shall be determined as if all such persons had joined in the appeal, but no costs shall be taxed against any such person who did not join in the appeal nor ask to be heard in the supreme court. The order of names of parties shall be the same in the supreme court as in the circuit court.”

The purpose of that enactment was to simplify appellate procedure. Under its provisions where there is a decision, judgment, order or decree against two or more persons either or any of them may appeal therefrom and use the names of all the persons affected. The party appealing shall, however, serve those of such persons who have not joined in the appeal and can be found within the Territory with a copy of the notice of appeal. In the present case if the record before us is to be the guide the

Opinion of the Court.

appellant Coan did not serve a copy of his notice of appeal upon any of the other parties either affected or otherwise although all of the parties except Coan are residents of the Territory. He apparently chose to prosecute his appeal solely in his own name and behalf.

But aside from these questions there is a fundamental principle of law which is a complete bar to the granting of this application for a rehearing as well as to the recognition of any right of the trustees to have a review of the decree of the court below by a writ of error or otherwise. It is a principle of appellate procedure which runs in a true course through all the text books, reports and statutes. It is referred to in our former opinion and is to the effect that the appellate jurisdiction of this court can only be invoked by a party aggrieved by the decision, judgment, order or decree of the court below. See *McCandless v. Pratt*, 211 U. S. 437 and authorities cited in the former opinion in this cause. The same principle is recognized in Act 45 *supra* in the following language: "In case the decision, judgment, order or decree sought to be reviewed was rendered *against* two or more persons * * * all such cases shall be determined as if *all such persons* had joined in the appeal." The decree in this case which Coan has brought here for review was not rendered against, nor does it affect, the trustees. They brought their bill in equity in the court below to obtain a construction of the will of James B. Castle, deceased, and to have a confirmation and approval of a compromise agreement which they had entered into with Harold K. L. Castle, a son of the deceased and one of the legatees named in the will. The court below entered a decree construing the will as requested and in conformity with the former opinion of this court and also approved the compromise agreement between the trustees and Harold K. L. Castle in one of the alternate amounts agreed upon between them. From

Opinion of the Court.

this decree Coan has perfected an appeal which has been disposed of by an affirmance of the decree of the lower court. Neither the trustees, Harold K. L. Castle, nor the attorney general, representing the public charity, have appealed. Harold K. L. Castle is satisfied with the decree below and so is the attorney general, who in fact represents the only interest which might claim to be substantially aggrieved by the decree of the court below. The trustees are not affected one way or the other. It should be no concern of theirs whether that portion of the funds of the estate in question be given to the son of the deceased or devoted to the purposes of the boarding school contemplated in the will. Both of these interests are represented by able and competent counsel who are fully qualified to protect the interests which they respectively represent and they have acquiesced in the decree below. The trustees should occupy a neutral and indifferent attitude in any controversy between the real parties in interest and clearly they ought not to be allowed to litigate the claim of one such interested party as against another such party. If the estate itself as an entity is attacked it would be the duty of the trustees to defend and if such defense requires that an appeal be prosecuted it would then be the duty of the trustees and they would have the undoubted right to prosecute an appeal. So if the interest of the estate require the bringing of a suit such suit should be brought in the name of the trustees and in the event of an unfavorable judgment or order the trustees should appeal therefrom if such appeal would be proper to protect the interests of the estate. But beyond this neither their duty nor their rights will permit them to go. With controversies which affect the individual interests alone of those who may be interested in their trust they have nothing to do and consequently cannot be aggrieved

Opinion of the Court.

by a decree which affects those individual interests. See *Goldtree v. Thompson*, 83 Cal. 420.

Counsel for the trustees have advanced the novel doctrine that this court having once assumed jurisdiction of the cause on appeal should proceed not as an appellate tribunal but as a court of original chancery jurisdiction and direct the administration of the trust estate. In support of this unique contention they quote the language of Chief Justice Shaw in *Parker v. May*, 5 Cush. 336, where it was said: "It is no doubt true that having jurisdiction over all trusts for charitable purposes, when that jurisdiction once attaches by bringing a case under the head of trusts this court will administer its powers in a manner and upon rules somewhat different from those which are applicable to private trusts and in the same liberal manner to carry into effect the purposes of the trust as a court of chancery. * * * It will aid and assist the trustees in carrying the trust into effect at the suit of any party interested." The inference is that Chief Justice Shaw was speaking for the supreme judicial court of Massachusetts, whereas in fact, when he rendered the opinion from which the above quotation is taken, he was sitting as judge of a court of original chancery jurisdiction under the powers conferred by chapter 81 of the Revised Statutes of Massachusetts of 1836. His jurisdiction was co-extensive with that of Judge Banks, whose decree is now before us, and the language used by the learned and revered chief justice of Massachusetts was never intended to have reference to the powers and duties of an appellate tribunal.

The petition for a rehearing is denied.

Robertson, Castle & Olson for the petition.

Opinion of the Court.

WILLIAM R. CASTLE, LORRIN A. THURSTON AND
ALFRED L. CASTLE, TRUSTEES UNDER THE
WILL OF JAMES B. CASTLE, DECEASED, v.
HARRY IRWIN, ATTORNEY GENERAL OF THE
TERRITORY OF HAWAII, TITUS M. COAN OF
NEW YORK, STATE OF NEW YORK, AND HAR-
OLD K. L. CASTLE.

No. 1303.

PETITION FOR REHEARING.

FILED MARCH 2, 1921.

DECIDED MARCH 11, 1921.

COKE, C. J., KEMP AND EDINGS, JJ.

Per curiam: The respondent Titus M. Coan has interposed a motion for a rehearing in which he reiterates the same grounds contained in a like petition filed by the trustees. All of these questions have been disposed of in our opinion on the petition of the trustees. See ante p. 807. Coan claims to be aggrieved because of our refusal to permit the trustees to come to this court on his appeal. This refusal does not affect nor concern him and lays no foundation for granting him a rehearing. He had a full hearing in this court and while his actual interest in the subject-matter of the controversy is of the most trivial character yet we assumed jurisdiction and after considering the merits of his appeal directed an affirmance of the decree of the court below. He is entitled to nothing more.

Petition denied.

Marguerite K. Ashford for the petition.

Syllabus.

TERRITORY *v.* CHEE SIU.

No. 1296.

ERROR TO CIRCUIT COURT FIRST CIRCUIT.

HON. J. T. DEBOLT, JUDGE.

SUBMITTED MARCH 8, 1921.

DECIDED MARCH 23, 1921.

COKE, C. J., KEMP AND EDINGS, JJ.

SODOMY.

The morbid rule announced by some early day English and American courts to the effect that in a prosecution for sodomy emission must be proved, cannot be accepted as the true doctrine of the common law.

INDICTMENT AND INFORMATION—*charging crime in different forms of expression.*

The fact that the one crime is charged more than once in equivalent or synonymous expressions is not fatal to the indictment.

APPEAL AND ERROR—*instruction.*

Where the instruction is not couched in the identical language of the statute and might be misunderstood the mere saving of an exception to it without request for further instructions presents no error on appeal.

SAME—*rejected evidence.*

The refusal of the trial court to allow an answer to a question propounded by counsel for the defendant to a witness is not reversible error when the record does not disclose any offer to show what the answer will be and that the answer would be material and competent evidence.

OPINION OF THE COURT BY COKE, C. J.

The defendant, plaintiff in error herein, Chee Siu, was tried and convicted in the circuit court of the first judicial circuit of the crime of sodomy, and comes to this court on a writ of error.

Opinion of the Court.

The errors relied upon by the defendant in his brief are as follows:

First, that in the crime of sodomy emission, as well as penetration, must be shown.

Second, that the indictment herein is duplicitous;

Third, that the circuit judge erred in giving to the jury instruction No. 3 requested by the prosecution, to the effect that if the jury believed from the evidence that the act of sodomy itself was not consummated, but that the defendant did at the time and place alleged in the indictment attempt to commit the crime of sodomy, then the jury might find the defendant guilty of an attempt to commit sodomy; and

Fourth, that the trial court erred in sustaining an objection to a question on cross-examination propounded to K. Tomito, a witness called on behalf of the prosecution, as follows:

“Q. Isn't it a fact that you have known the defendant for a number of years and he has always, as far as you know, borne a good reputation, a good character?”

Considering these several assignments of error in their order, we are first required to determine whether under the laws of the Territory of Hawaii in a prosecution for the crime of sodomy emission must be established as a necessary element of the crime. Section 4154 of the Revised Laws of Hawaii, 1915, which denounces the crime of sodomy does not attempt to define it, hence we are relegated to the common law for a definition and for guidance respecting the essential elements required to be established in a prosecution for the crime.

In the time of Lord Coke and later during the Blackstonian period there was much contrariety of opinion as to the law on this subject, but in 1828 it was put at rest by the statute of 9th Geo. IV, c. 31, which declared that

Opinion of the Court.

it should not be necessary in this class of cases to prove emission.

In the United States also, it is surprising to note, there has been some diversity of opinion expressed by the courts. Mr. Greenleaf treats of the subject as follows:

“In the proof of *carnal knowledge* it was formerly held, though with considerable conflict of opinion, that there must be evidence both of penetration and of injection. But the doubts on this subject were put at rest in England and by the statute of 9 Geo. IV, c. 31, which enacted that the former of the two facts was sufficient to constitute the offence. Statutes to the same effect have been passed in some of the United States. But, as the essence of the crime consists in the violence done to the person of the sufferer, and to her sense of honor and virtue, these statutes are to be regarded merely as declaratory of the common law, as it has been held by the most eminent judges and jurists both in England and in this country.” 3 Greenleaf, Sec. 210.

While Greenleaf was discussing the crime of rape in the foregoing quotation, yet it is universally recognized that rape and sodomy are kindred crimes and that the principles governing one also governs the other, with the distinction that in a prosecution for sodomy there is less reason for requiring proof of emission than in a prosecution for rape.

The subject now before us has not so far as we are advised been presented to the courts of Hawaii, but in prosecutions for rape it has never in this jurisdiction been considered necessary to prove emission. The ridiculous and morbid rule to the contrary announced by some early day English and American courts cannot be accepted as the true doctrine of the common law either as to the crime of rape or the crime of sodomy.

The supreme court of Louisiana in *State v. Vicknair*,

Opinion of the Court.

28 So. 275, after referring to the fact that it was in the *Hill* case, 1 East P. C. 439 decided in 1781 where proof of emission was held to be necessary, then proceeded to demolish that doctrine in the following language:

“The question, then, is whether the decision in *Hill’s* Case is to be regarded as absolutely conclusive as to what the common law was in 1805, merely because it happened to stand unreversed at that time. We are of opinion that it should not be so regarded, and especially with respect to the particular crime with which the present defendant is charged (sodomy), the enormity of which consists solely in its utter bestiality. We are strengthened in this view by the fact that as early as 1812, in Virginia, and in 1813, in South Carolina, it was held that at common law penetration alone constituted the crime of rape as well as of sodomy. See 2 Archb. Cr. Pl. & Prac. pp. 164, 165, notes, in which it is said: ‘In Virginia, as early as 1812, the general court thought that the opinion of Coke, as expressed in his third Institutes (pages 59, 60), and of Lord Hale (1 Hale, P. C. 628), together with the modern decisions in favor of the fact of penetration alone constituting the crime of rape as well as sodomy, were more rational than the contrary opinions and decisions, which require both facts to be proved,—citing, also, *State v. Le Blanc*, 1 Tread. Const. 354, and *Pennsylvania v. Sullivan*, Add. 143.’ ”

The second assignment of error is that the indictment is duplicitous, the contention being that several separate and distinct crimes are charged against the defendant in the one count thereof, which reads as follows:

“That Chee Siu at the City and County of Honolulu, Territory of Hawaii, and within the jurisdiction of this Honorable Court, on the 25th day of May, nineteen hundred and twenty, feloniously, wickedly and against the order of nature, did have a venereal affair with a certain male human being, to wit, a boy named Hideo Tomita, and then and there feloniously did carnally know the said boy, and then and there feloniously, wickedly and against

Opinion of the Court.

the order of nature, with the said boy did commit and perpetrate the abominable and detestable crime of Sodomy."

The most that can be said against the indictment is that the one crime is charged twice in different forms of expression. This, however, is not fatal to the indictment and does not afford grounds for granting the motion in arrest of judgment interposed by the defendant. See *Rep. v. Palea*, 12 Haw. 159.

"Duplicity: An indictment or information charging that the accused committed the 'crime against nature' by a certain specific act of carnal knowledge, 'and did then and there commit the crime of sodomy,' the instrument is not open to the objection that it is duplicitous, for the reason that the terms 'crime against nature' and 'sodomy' are equivalent or synonymous expressions and both charge one and the same crime." 2 Whar. Crim. Pro. 10 ed. Sec. 1247.

The third error assigned has reference to instruction No. 3 given to the jury at the request of the prosecution. This instruction reads as follows:

"I instruct you further, gentlemen of the jury, that upon a prosecution for the crime of sodomy if you believe from all the evidence that the act of sodomy itself was not consummated, but that the defendant did at the time and place and in the manner alleged in the indictment attempt to commit the crime of sodomy you may find the defendant guilty of an attempt to commit sodomy."

It is claimed by the defense that this instruction is bad for two reasons, (1) that it omits the rule of reasonable doubt; and (2) that while under Section 3833 of the Revised Laws of Hawaii, 1915, a defendant may upon proper proof be convicted of an assault with intent to commit sodomy, there is no law in this jurisdiction which recognizes an attempt to commit sodomy as a crime.

Opinion of the Court.

While the judge of the court below did not embody within this instruction the rule of reasonable doubt, in a subsequent instruction the jury was fully instructed in respect thereto and that was all the defendant had a right to ask. No instruction upon the lesser degree of crime was requested by the defendant, and the court instead of attempting to cover the subject by an instruction might well have ignored it. The instruction complained of is not couched in the identical language of the statute but the mere saving of an exception to it without a request for further or other instructions presents no error on appeal. See *Ter. v. Furomori*, 20 Haw. 344.

Had the accused under the instruction complained of been convicted of an "attempt" to commit sodomy, or had the court refused a request by the accused to advise the jury of its power to convict him of an assault with intent to commit sodomy under the last paragraph of Sec. 3833, *supra*, some weight might be attached to the contention of the defendant.

But it must be borne in mind that under the statute and as clearly expressed in the instruction, the jury could only find the defendant guilty of the lesser degree of the crime after it had found that the evidence was insufficient to warrant a conviction for the crime of sodomy.

In this case the jury was satisfied from the evidence of the defendant's guilt of the crime charged which fact of itself indicates that the lesser degree of the crime could not have been involved.

The fourth and last assignment of error complains of the refusal of the trial judge to permit the defendant to attempt to establish a good character upon the cross-examination of one of the witnesses for the prosecution. The ruling of the trial judge in this respect must be approved. The question propounded was not proper cross-examination, and the defendant did not make the witness his own.

Opinion of the Court.

But even had the question been entirely competent, yet the refusal of the court to permit an answer could not be reversible error unless the defendant made it appear that the answer would have been favorable to him. See *Yim Fat v. Gleason*, 24 Haw. 210.

Finding no error in the record the assignments of error are overruled and the judgment below is affirmed.

Brown, Cristy & Davis for plaintiff in error.

W. H. Heen, City and County Attorney, and *H. E. Stafford*, Third Deputy City and County Attorney, for defendant in error.

WHEREAS, Robert Warren Breckons, since 1902 a member of the Bar of Hawaii, for twelve years United States District Attorney for the District of Hawaii, and ever active in politics and public affairs, was on November 26th, 1918, taken by death,

NOW THEREFORE, BE IT RESOLVED, That the Bar Association of Hawaii hereby expresses its appreciation of his ability and learning as a lawyer, his genial qualities that endeared him to all, his keen judgment of human nature, his wide knowledge of men and of affairs, his loyalty as a citizen and as a member of the Bar and his faithfulness in all relations of life.

AND BE IT FURTHER RESOLVED, That, as a tribute of respect and affection, this resolution be presented before the Supreme Court of the Territory of Hawaii, and a copy thereof be sent to his family.

Honolulu, January 13, 1920.

WHEREAS, David L. Withington, a valued member of the Bar Association of Hawaii, was recently and very unexpectedly removed by death,

NOW THEREFORE, BE IT RESOLVED, That the Bar Association of Hawaii hereby expresses its keen regret at his death and feels that his wise counsel, kindly aid and suggestions will be greatly missed by all who knew him; that his death is felt as a great loss not only to the legal profession of this Territory, but also to the profession throughout the United States of America and to the entire community in which he lived where he was always alive to public duties, devolving upon private citizens, never failing in assuming and performing such duties when the same devolved upon him.

AND BE IT FURTHER RESOLVED, That, as a tribute of respect and affection, this resolution be presented before the Supreme Court of the Territory of Hawaii and a copy thereof be sent to his family.

Honolulu, January 13, 1920.

WHEREAS, George A. Davis, for many years an active member and participant in the affairs of the Bar Association of Hawaii, and one who has heretofore taken a most prominent and effective part in the development of jurisprudence in the Hawaiian Islands, was recently and suddenly removed by death,

NOW THEREFORE, BE IT RESOLVED, That the Bar Association of Hawaii hereby expresses its deep appreciation of his ability and learning as a lawyer, his loyalty as a friend, his knowledge of men and affairs, his activity in civic duties and his true American patriotism.

AND BE IT FURTHER RESOLVED, That, as a tribute of respect and affection, this resolution be presented before the Supreme Court of the Territory of Hawaii, and a copy thereof be sent to his family.

Honolulu, January 13, 1920.

The death of WILLIAM LOCKE WHITNEY removes a widely popular and highly respected member not only of the Bar but of the community, a man of strong yet lovable character, of broad accomplishments, not merely a versatile and able lawyer but a good friend, a good citizen, a good Christian, of unusual public spirit and love for his fellow man, a progressive and creative influence for good, who put his theories to the test in social service that was constant and unwavering from his admission to the Bar to the time when physical incapacity removed him from a life of broad activity. His practical love for unfortunate youth created the Juvenile Court whose affairs he administered with admirable judgment and firmness, tact and sympathy. His accomplishments as Deputy Attorney General, Judge of the District Court of Honolulu and of the First Circuit Court covering the greater period of his life as a lawyer were uncommonly brilliant and salutary: his influence as a judge and as a citizen affected the whole community in a real and substantial way. He was a writer and a public speaker of originality and power, and an executive of resourcefulness, who with modesty gave his talents when needed for the public good.

His loss is widely felt, among all races and all classes, and it is a heavy misfortune that one of such youthful vitality of spirit and of such potentiality in diverse fields of usefulness should have been taken away when the world so needed him. We are proud of his accomplishments, and we shall miss his good humor, his good cheer, his good fellowship, his idealism in everyday life.

In token of our appreciation of him and of our sorrow at his loss, be it resolved that we, the Bar Association of Hawaii, adopt this expression of our love and respect, that this resolution be presented to the Supreme Court of Hawaii for entry in its minutes, and that a copy thereof be sent to his wife and his parents.

Honolulu, March 9, 1920.

RULES OF THE SUPREME COURT

In Force June 1, 1921.

1. ENTRY OF CASES ON CALENDAR.

1. The clerk shall place upon the calendar each case brought to or pending in this court in its proper chronological order and forthwith give notice thereof to the parties.

2. If the necessary papers are not filed in this court within twenty days after the issuance of a writ of error, perfecting of an appeal or allowance of a bill of exceptions or such further time as may be allowed by this court or a justice thereof the appeal may be dismissed for want of prosecution. Failure of the stenographer to furnish a transcript of the evidence shall not excuse delay unless within ten days after the filing of the decree, judgment or verdict sought to be set aside the appellant shall have obtained from the lower court or judge a direction to the stenographer to prepare and furnish the desired transcript in the regular order of cases tried or in such other order as the court or judge shall direct, which direction may be conditioned on the appellant's making a deposit or giving security for the estimated cost of the transcript.

2. CALL AND ORDER OF CALENDAR.

1. Cases will be called for argument or trial in the order in which they stand on the calendar except as hereinafter provided or otherwise ordered. Sessions will be held beginning on the first Monday of each month during the term unless otherwise ordered.

2. If the parties, or either of them, shall be ready to proceed when the case is called, the same will be heard, unless otherwise ordered for good cause shown. If neither party shall be ready, the case may be postponed or go to the foot of the calendar, as the court may order.

3. If a case is called at two sessions, and upon the call at the second session neither party is ready to proceed, it may be dismissed unless sufficient cause is shown for further postponement.

4. Criminal cases, cases in which the Territory is concerned and which also involve or affect some matter of general public interest, cases once adjudicated by this court on their merits and again brought up, writs of habeas corpus and extraordinary writs, may be advanced by leave or order of the court.

5. Two or more cases involving the same question may, by leave or order of the court, be heard together, to be argued as one case or more, as the court may order.

6. Any case may, by filed stipulation, be submitted on briefs without oral argument at any time during the term, irrespective of its position on the calendar.

7. Except as aforesaid, no case will be taken up out of its order on the calendar or be set down for any particular day except upon special and peculiar circumstances to be shown to the court.

8. No stipulation or agreement of the parties to advance, pass or postpone a case, or to substitute one case for another, shall be binding upon the court. A case may be so advanced, passed, postponed or substituted only upon application made and leave granted in open court.

3. BRIEFS.

1. Within fifteen days after an appeal case has been placed on the calendar the appellant shall file a printed or typewritten brief and two copies thereof and a certificate or acknowledgment of service of a copy thereof upon the appellee. This brief shall contain, in the order here stated, (a) a concise abstract or statement of the case presenting succinctly the facts, the questions involved and the manner in which they are raised. (b) A specification of the exceptions or assigned errors which are relied upon. When the error alleged is to the admission or to the rejection of evidence the specification shall state the substance of the evidence admitted or rejected. When the error alleged is to the charge of the court the specification shall set out the part referred to in full, whether it be instructions given or instructions refused. (c) A brief of the argument exhibiting a clear statement of the points of law or fact to be discussed and the authorities relied upon in support of each point. When evidence is referred to the page or pages on which it appears in the transcript shall be stated.

2. Within ten days after receipt of a copy of the appellant's brief the appellee shall file a printed or typewritten brief and two copies thereof and a certificate or acknowledgment of service of a copy thereof on the appellant. This brief shall be of like character with that required of the appellant except that no specification of errors shall be required and no statement of the case unless that presented by the appellant is controverted.

3. Within five days after receipt of a copy of the appellee's brief the appellant may file a brief confined strictly to matter in reply to the appellee's brief.

4. Every brief of more than 25 pages shall contain on its front fly leaves a subject index with references to the pages of the brief.

5. As to cases of reserved questions. In cases in which a single question has been reserved, the party maintaining the affirmative

shall, for the purposes of this rule, be regarded as the appellant and his opponent as the appellee. So also where there are several questions and the one party has the affirmative as to all of them. Where several questions have been reserved as to which a party maintains the affirmative as to some of them and the negative as to others, the plaintiff (or petitioner or movant) shall be regarded as the appellant and the defendant (or respondent) as the appellee, unless, upon application to the court, a special order shall be made.

6. It will be a sufficient compliance with the foregoing provisions of this rule if the briefs are deposited in the mail, duly postpaid and addressed to the office address of the clerk or opposing counsel, as the case may be, in time to reach such address in due course of mail within the times limited in said provisions.

7. When, according to the foregoing provisions of this rule, an appellant is in default, the case may be dismissed; and when an appellee is in default, he will not be heard, except on consent of his adversary or on call of the court.

8. In cases brought originally in this court, briefs shall be filed on both sides at or before the argument, unless otherwise ordered by the court.

9. Whenever an extension of time for the filing of a brief is obtained, otherwise than pursuant to a stipulation of the respective parties, a copy of the order granting the extension shall forthwith be served by the party obtaining the same upon the opposite party.

4. ORAL ARGUMENTS.

1. The appellant or, in original cases, the petitioner, shall be entitled to open and conclude the argument of the case; but when the questions on appeal arise solely upon demurrer, or otherwise solely upon the pleadings, the order of argument shall be the same as in the court below. When there are cross appeals they shall be argued together as one case, and the plaintiff in the court below shall be entitled to open and conclude the argument.

2. Not more than two hours on each side will be allowed for argument without special leave of the court granted before the argument begins.

5. REHEARING.

A petition for rehearing may be presented only within twenty days after the filing of the opinion or the rendition of judgment unless by special leave additional time is granted during such twenty days by the court or a justice thereof; and shall briefly and distinctly state its grounds, and be supported by certificate of counsel; and will not be permitted to be argued unless a justice who concurred in the opinion or judgment desires it. If the case has been remitted to the lower court it may be recalled.

6. MOTIONS.

1. All motions shall be reduced to writing. No facts will be considered unless shown by the record or by affidavit.

2. A copy of the motion shall be served on the opposite party not less than forty-eight hours before the hearing, unless otherwise ordered by the court.

3. The motion day shall be the first day of each stated session.

4. Any motion of which notice shall have been given to the clerk in advance, shall be entered on the clerk's list in the order in which he receives such notice, and shall have priority in that order before other motions.

5. Not more than half an hour on each side shall be allowed for argument of a motion, without special leave of the court before the argument begins.

6. There may be united with a motion to dismiss, a motion to affirm on the ground that, although the record may show that the case is properly before this court, it is manifest that the appeal was taken for delay only or that the question involved is such as not to need further argument.

7. APPEAL, ERROR AND EXCEPTIONS FROM CIRCUIT COURTS AND CIRCUIT JUDGES.

1. On appeal, error or exceptions from a circuit court or circuit judge, no original papers other than bills of exceptions, transcripts of evidence and exhibits, shall be transmitted to this court unless by order of the court or a justice thereof. Original transcripts and exhibits may be returned to the circuit court or judge upon the determination of the case in this court unless otherwise ordered. Copies of papers shall be printed or typewritten and certified.

2. Bills of exceptions shall contain only such papers and statements as are necessary for the disposition of the questions of law raised by the exceptions. No papers shall be made a part thereof by reference unless specifically named.

3. In every case in which a proposed bill of exceptions shall be disallowed by a circuit judge and the establishment of the bill in this court shall be desired by the appellant, the record shall be composed of the same original papers and certified copies of papers and shall be transmitted to this court within the same time as though the bill of exceptions had been allowed by the circuit judge. The appellant shall, within ten days after the filing of the necessary papers aforesaid in this court, file a motion, supported by affidavit to the effect that all of the allegations of the bill are true and that the circuit judge refused to allow and sign the bill, asking that he may be allowed to establish the truth of the bill and that a time be set for a hearing on the motion. If the truth of the bill shall be established the bill shall be allowed. Failure to comply with any

requirement of this rule shall subject the proposed bill of exceptions to removal from the files of this court.

4. In order to obtain a review in this court of an interlocutory ruling or order in a term case the exception thereto must be presented to the circuit judge for allowance and certification to this court within ten days from the making of the ruling or order sought to be reviewed, and within five days after the exception is certified to this court for review the party taking the exception must pay the necessary costs, and file the necessary bond or make cash deposit in lieu thereof. The ruling or order sought to be reviewed and all parts of the record in the case necessary to a determination of the questions raised must be made a part of the exception, either by reference, or by embodying the same therein.

5. After final judgment a party seeking a review in this court by exceptions must within a reasonable time not exceeding twenty days after the allowance of his bill of exceptions file the necessary bond or deposit cash in lieu thereof.

6. When a circuit judge certifies an interlocutory exception to this court, or allows and signs a bill of exceptions after final judgment he must immediately cause notice thereof to be given to counsel for the respective parties, or to parties who have not appeared by counsel, unless counsel or the parties are present at the time of the allowance and certifying the interlocutory exception to this court, or the allowance and signing of the bill of exceptions after final judgment, as the case may be.

8. WRITS OF ERROR.

Cases brought up by writ of error, as well as those brought up by appeal or bill of exceptions, shall retain the title of the case below without reversing the order of the names.

9. COSTS.

1. Attorneys shall be liable for costs of court incurred by their respective clients.

2. Bonds for costs on appeal to the Supreme Court shall be made to the Clerk of the Supreme Court, filed in the court from which the appeal is taken and forwarded by such court to the Supreme Court.

10. MANDATE.

1. Whenever appropriate upon the determination of a matter in this court a notice or mandate shall be issued to the court below informing that court of the proceedings in this court or directing further proceedings in that court as to law and justice may appertain. The notice or mandate may issue at any time on the order of the court or a justice thereof, but, unless otherwise ordered by the

court or a justice thereof, it shall issue as of course after ten days from the rendition of judgment.

2. In criminal cases the clerk shall forthwith issue the mandate upon the form being approved by one of the justices.

11. PAPERS.

No paper shall be taken from the files of the court except by permission of the court or a justice thereof.

12. LIBRARY.

No book, pamphlet or magazine shall be taken from the library of this court, except for use in a court room within the Judiciary Building, without the written permission of a justice of this court. Any person violating this rule shall be liable to suspension from the use of the library and shall make good all loss.

13. APPEALS FROM DISTRICT COURTS.

District Magistrates in all cases in which appeals have been taken and perfected from them to the Supreme Court, shall forward without delay to the Clerk of the Supreme Court a certificate of appeal, stating the nature of the action, the decision made and the points of law upon which the appeal is taken; also, the summons or warrant, all vouchers and exhibits filed, or certified copies thereof, and a transcript of the testimony; also, all costs paid by either party to the action, with a clear and itemized statement showing by whom, and the purpose for which, each amount is paid, keeping back nothing but statutory fees and mileage, and stating explicitly what is kept back.

14. DEFENSE OF TITLE IN DISTRICT COURTS.

Whenever, in the District Court, in defense of an action of trespass, or a suit for the summary possession of land, or any other action, the defendant shall plead to the jurisdiction in effect that the suit is a real action, or one in which the title to real estate is involved, such plea shall not be received by the court, unless accompanied by an affidavit of the defendant, setting forth the source, nature and extent of the title claimed by defendant to the land in question, and such further particulars as shall fully apprise the court of the nature of defendant's claim.

15. ADMISSION TO THE BAR.

1. Each applicant for admission to the bar shall file with the clerk a verified application setting forth his name, age, nationality, last place of residence, the character and term of his study and if he has been admitted to practice before the highest court of any

other state, territory or country, that he is in good standing in such court. Said application shall also set forth all other matters appertaining to the applicant's qualifications for admission as in these rules required or as required by the laws of the Territory of Hawaii. Said application shall be accompanied by the recommendation of at least two attorneys of this court and by such other documents as may be necessary to show the applicant's qualifications. The recommendations required must set forth how long a time, when and under what circumstances those making the same have known the applicant and must state that the applicant is to the knowledge of those making the recommendations a person of good moral character.

2. An applicant who is a member of the bar of the highest court of some other state, territory or country that requires an examination for original admission to the bar and who has engaged in at least three years of active practice in the place or places where he has been admitted may be admitted to practice before this court on motion. It is provided, however, that such applicant for admission on motion shall file with his application a certificate of a judge of a court of record in such state, territory or country showing that an examination for original admission to the bar is required in such state, territory or country, that the said applicant has been actively engaged in the practice of his profession for three years immediately preceding the date of his application or the date of his departure from such state, territory or country, that the applicant is in good standing before the bar of such state, territory or country and that the applicant is a person of good moral character.

And it is further provided that the court before admitting such applicant on motion, or authorizing him to appear before the examining board, for examination as to his legal qualifications, shall always upon due investigation satisfy itself as to the good moral character and professional standing of the applicant in the state, territory or country from which he has removed.

3. No applicant who is not a member of the bar of the highest court of some state, territory or country will be admitted to practice in this court unless he is a graduate of a law school of recognized standing or unless he shall have studied diligently at least three years in such law school or in the office of one or more competent attorneys or partly in such school and partly in such office for a total period of three years. No correspondence course, extension course, or other course or period of home-study will be accepted as the equivalent of the requirement of graduation from a law school or actual study in a law school or in the office of a competent attorney as provided by this rule.

4. Any applicant not admitted on motion as in paragraph 2 of this rule provided must pass an examination which satisfies the court

that he has the legal and educational qualifications entitling him to be admitted to practice as an attorney before the court.

5. No person who is not a citizen of the United States will be admitted on motion or otherwise. (Act 81, Session Laws, 1921.)

6. No attorney who has been disbarred shall be reinstated except upon a showing that he has complied in good faith with the order of disbarment, and he shall make such additional or further showing as may be required by the court.

7. There shall be a committee of three members of the bar appointed by this court who shall constitute the Board of Examiners to conduct the examination of any applicant for admission to the bar except those admitted by motion as herein provided; said board shall examine into the legal and educational qualifications of the applicant for admission and must give a written examination and may give an oral examination in addition thereto. Said board shall report to this court its recommendation. The record of said examination shall be filed in this court together with applicant's application.

8. No applicant whose application has been denied shall again apply for admission within six months thereafter.

9. Unless otherwise directed by the court regular examinations of candidates for admission to the bar will be held at Honolulu during the months of January and July of each year.

16. DEFINITIONS.

Within the meaning of the rules of this court, whenever appropriate, appeal cases include cases brought up on bill of exceptions or writ of error, "appellant" and "appellee" include the plaintiff and defendant in error respectively; and "party," "appellant" and "appellee" and other words denoting the parties include their counsel.

17. ELECTION CASES.

Petitions by any candidate directly interested or by thirty voters of any election district, setting forth cause why the decision of any board of inspectors of elections shall be reversed, corrected or changed, shall be verified or supported by the affidavit of some person or persons having personal knowledge of the facts claimed to be ground for reversing, correcting or changing the decision.

18. RULES RELATING TO GRAND JURIES.

A. WHEN REQUIRED.

"No persons shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand

jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger." U. S. Const. Amend., Art. 5.

B. HOW DRAWN.

"Until otherwise provided by the legislature of the Territory grand juries may be drawn in the manner provided by the Hawaiian statutes for drawing petty juries." Org. Act, Sec. 83.

C. QUALIFICATIONS OF JURORS.

"No person who is not a male citizen of the United States and twenty-one years of age and who cannot understandingly speak, read and write the English language shall be a qualified juror or grand juror in the Territory of Hawaii," "and all juries shall hereafter be constituted without reference to the race or place of nativity of the jurors." Org. Act, Sec. 83.

D. NUMBER OF JURORS.

The number of grand jurors in each circuit shall be not less than thirteen nor more than twenty-three. See Org. Act, Sec. 83, and Sec. 2414 R. L. 1915.

E. SESSIONS.

"Until otherwise provided by the legislature of the Territory, grand juries * * * shall sit at such times as the circuit judges of the respective circuits shall direct." Org. Act, Sec. 83.

F. CHALLENGES.

Before the grand jury retires, the prosecuting officer or any person held to answer a charge for a criminal offense, may challenge the panel or an individual juror, for cause to be assigned to the court. All such challenges shall be tried and determined by the court.

G. FOREMAN.

From the persons summoned to serve as grand jurors and appearing the court shall appoint a foreman, and may remove him for cause. The court may appoint another foreman when the necessity arises.

H. OATH OF GRAND JURORS.

Substantially the following oath shall be administered to the grand jurors:

"You, and each of you, do solemnly swear (or affirm) that you will diligently inquire, and true presentment make, of all such matters and things as shall be given you in charge, or shall otherwise come to your knowledge touching this present service; that you will present no one through envy, hatred, or malice, nor leave any one

unpresented through fear, favor, affection, gain, reward or hope therefor, but will present all things truly, as they come to your knowledge, according to the best of your understanding; and that you will keep secret the proceedings had before you."

I. CHARGE OF THE COURT.

The grand jury, being impanelled and sworn, shall be charged by the court. In doing so, the court shall give them such information as it may deem proper as to their duties and as to the law pertaining to such cases as may come before them. The court may further charge the jury when the necessity arises.

J. OFFICER IN ATTENDANCE.

The court may appoint an officer to attend upon the grand jury.

K. RETIREMENT OF THE GRAND JURY.

The grand jury shall then retire to a private room and inquire into the offenses cognizable by them.

L. CLERK.

The grand jury may appoint one of their number to be their clerk, to preserve minutes of the proceedings before them, which minutes shall be delivered to the prosecuting officer, when so directed by the grand jury.

M. SUBPOENA OF WITNESSES.

"The several circuit courts may subpoena witnesses to appear before the grand jury in like manner as they subpoena witnesses to appear before their respective courts." Org. Act, Sec. 83.

N. SWEARING WITNESSES.

Witnesses appearing before the grand jury may be sworn in open court or by the foreman of the grand jury, or, in his absence, by any member thereof.

The oath or affirmation may be substantially as follows:

"You do solemnly swear (or affirm) that the evidence which you shall give before the grand jury shall be the truth, the whole truth, and nothing but the truth."

O. PRESENCE OF OTHERS WITH JURORS.

The prosecuting officer or any member of the grand jury may interrogate witnesses before the grand jury. The prosecuting officer shall advise the grand jury in regard to the law of the cases that come before them, and draw the indictments. An interpreter may be present at the examination of witnesses before the grand jury upon request of the foreman. The circuit judge before whose court

the grand jury is in attendance may upon request of the foreman of the grand jury assign an official circuit court reporter to attend and report the testimony given by the witnesses before the grand jury and who shall furnish the prosecuting officer with a transcript of such testimony when so directed by the foreman of the grand jury. The interpreter and the reporter shall keep secret all proceedings of the grand jury. Except the prosecuting officer, shorthand reporter, interpreter and witnesses under examination, no person shall be permitted to be present during the session of the grand jury. No person except the members of the grand jury shall be permitted to be present during the expression of their opinions or the giving of their votes.

P. TWELVE GRAND JURORS TO CONCUR.

No indictment shall be found, nor shall any presentment be made, without the concurrence of at least twelve grand jurors.

Q. INDORSEMENT BY FOREMAN AND PROSECUTING OFFICER.

An indictment when found shall be indorsed, "A true bill," and such indorsement shall be signed by the foreman. An indictment shall be indorsed also by the prosecuting officer. A presentment, when made, shall be signed by the foreman.

R. PRESENTING AND FILING.

Indictments or presentments, when found, shall be presented by the foreman, in the presence of the other grand jurors, to the court, and shall there be filed; but such as are found for a felony against any person not in custody or under recognizance, shall not be open to the inspection of any person except the prosecuting officer until the defendant therein shall have been arrested.

DIGEST

ABATEMENT AND REVIVAL.

1. *Grounds of abatement—another action pending.*

If a suit is commenced while a prior suit is pending in the same court for the same cause between the same parties the pendency of the prior suit is a good plea in abatement unless a dismissal, discontinuance or other termination of the first suit is had before the plea of the pendency of such suit is filed in the second suit. *Yee Hop v. Nakuina*, 205.

ACCOUNTS.

See GUARDIAN AND WARD, 1.

ACTIONS.

1. *Defenses.*

The respondent cannot set up his own wrongful conduct as a defense to this action. *Kumalae v. Kalauokalani*, 1, 13.

See PLEADING, 1.

ALIMONY.

See DIVORCE.

AMENDMENTS.

See PLEADING.

ANNUITIES.

1. *Nature of interest—assignment.*

Where property was given by will to a trustee to hold until the death of the last survivor of a number of annuitants and for twenty-one years thereafter to pay certain annuities and to accumulate the unpaid income and then divide the trust estate "among those persons entitled at that time to the aforementioned annuities" an annuity payable to A. J. G. "for life and then to their heirs" the interest of the heirs in the annuity was an estate of inheritance and was assignable. *Hawaiian Trust Co. v. Galbraith*, 174.

See ESTATES, 1; TAXATION, 4.

APPEAL AND ERROR.

1. *Effect of findings of fact in equity.*

On an appeal in an equity case the findings of fact by the circuit judge are not binding on the supreme court, but where the findings depend upon the credibility of witnesses and the weighing of conflicting testimony such findings are entitled to great weight. *McCandless v. Castle*. 22, 33.

APPEAL AND ERROR—Continued.

2. *Appealable orders.*

The Territory is not entitled to a writ of error to review a judgment sustaining a motion to quash an indictment. *Territory v. Anderson*, 55, 57.

3. *Bill of exceptions—extension of time.*

An order extending the time for presenting and serving a bill of exceptions twenty days from and after the filing of the transcript of evidence is not void for uncertainty. *Wong Wong v. Skating Rink*, 92, 94.

4. *Exceptions—questions previously decided.*

When a bill of exceptions brings up only questions which have been decided on a former appeal the exceptions will be dismissed, but questions arising on necessary proceedings subsequent to the mandate and not covered by the former appeal are a proper subject of exceptions. *Wong Wong v. Skating Rink*, 92.

5. *Bond on error—sufficiency.*

A bond on writ of error conditioned to pay all costs and damages caused by virtue of the stay of execution, does not obligate the plaintiff in error to pay the judgment and is insufficient under the statute. *Kahepu v. King*, 137.

6. *Dismissal for insufficient bond.*

When a bond on writ of error is insufficient the writ will only be dismissed on failure of plaintiff in error to comply with an order to file a proper bond. *Kahepu v. King*, 137.

7. *Failure to file briefs—dismissal of appeal.*

A writ of error may be dismissed for failure by plaintiff in error to file briefs within the time required by the rules. *Keahiliha v. King*, 139.

8. *Default judgment.*

A question which may not be reviewed upon appeal or error where the defendant has merely failed to raise the question in the court below will not be reviewed upon a writ of error from a default judgment when the trial court has not been given an opportunity to correct the error upon motion to set aside the default. *Tomishima v. Hurley*, 165, 166.

9. *Findings of fact.*

A failure to make or file findings of fact will not be considered in the absence of a request therefor and an exception to the court's refusal or noncompliance with the request. *Tomishima v. Hurley*, 165, 167.

10. *Void default judgment—defective complaint.*

Where a default judgment is attacked on the ground that the complaint does not state a cause of action and no motion has been made in the trial court to have the judgment set aside the complaint will be liberally construed and supported by every legal intendment and if it states facts sufficient to render the judgment

APPEAL AND ERROR—Continued.

thereon a complete bar to another suit for the same cause of action it will withstand the attack. *Tomishima v. Hurley*, 165, 169.

11. *Void default judgment—appeal therefrom.*

The general rule that an appeal or writ of error does not lie from a judgment by default without first moving to have the default set aside does not apply where the errors assigned are of such a nature as, if sustained, would render the judgment void. *Tomishima v. Hurley*, 165.

12. *Exceptions—costs.*

If subdivision 5 of Rule 8 of the supreme court is to be construed as placing burdens upon an appellant contrary to Sec. 2514, R. L. 1915, above referred to, then the rule is in conflict with the statute and must give way to it. *Ter. v. Kauhane*, 307.

13. *Exceptions—costs.*

Section 2514 R. L. 1915 provides that upon the allowance of a bill of exceptions and the deposit of twenty-five dollars or a bond of the same amount by the party excepting with the clerk of the court for costs to accrue in the supreme court the questions arising thereon shall be considered by the supreme court. This statute expressly designates all that is required of an appellant in order to entitle him to have the questions presented by the bill of exceptions considered by the supreme court and it is beyond the power of the supreme court by rule or otherwise to add to these requirements. *Ter. v. Kauhane*, 307.

14. *Final judgment in appellate court.*

An appellate court in reversing a judgment for the plaintiff on the ground of insufficiency of the evidence will direct a judgment for the defendant only when it appears that no new evidence can be procured upon a new trial. *Ter. v. Howell*, 320, 326.

15. *Final judgment in appellate court.*

In an action at law where the parties are as a matter of right entitled to a jury trial the appellate court can upon a reversal direct the entry of a judgment only where the error occurred after entry of the verdict. *Ter. v. Howell*, 320, 325.

16. *Carriers.*

An appeal does not lie directly to the territorial supreme court from an order made by the public utilities commission requiring a carrier to relocate its car tracks in the public highways of the city of Honolulu. *City & County v. H. R. T. & L. Co.*, 332.

17. *Law of the case.*

A question before this court and decided on an appeal cannot be reheard or examined upon a subsequent trial and appeal of the same case. *Wong Wong v. Skating Rink*, 347, 350.

18. *Law of the case.*

An opinion of this court reversing a judgment of the circuit court and remanding the cause for further proceedings does not preclude

APPEAL AND ERROR—Continued.

the parties from raising questions on a subsequent trial and appeal not involved in the former appeal. *Wong Wong v. Skating Rink*, 347, 351.

19. *Findings as to evidence.*

The findings of a trial court will not be disturbed by review on writ of error where to do so this court would be called upon to pass upon the credibility of witnesses or the weight of the evidence. *In re Kioloku*, 357, 364.

20. *Effect of sustaining of exceptions.*

Sustaining of exceptions by the Supreme Court has the effect of granting a trial *de novo* before the circuit court but no new rights are thereby conferred upon the parties. *O. R. & L. Co. v. Kaili*, 378, 380.

21. *Presumptions.*

In the absence of any showing to the contrary the Supreme Court will on appeal presume that evidence was adduced at the trial sufficient to sustain the verdict. *In re Gamaya*, 414, 416.

22. *Weight of evidence.*

By the provisions of section 2522 R. L. 1915 as amended by Act 44 S. L. 1919 this court is precluded on a writ of error from reversing any finding depending on the credibility of witnesses or the the weight of evidence. *Houghtailing v. de la Nux*, 438, 442.

23. *Sufficiency of bill—point waived when not seasonably made.*

A question not jurisdictional which was not raised by demurrer nor in appellants' specifications of error nor in their brief comes too late to have consideration when presented for the first time during the oral argument of counsel. *Houghtailing v. de la Nux*, 438, 444.

24. *Findings of fact—credibility of witnesses.*

Issues concerning the credibility of witnesses and the weight of the evidence are to be determined by the trial court and the findings cannot be disturbed if supported by evidence. *Moses v. Nobriga*, 483, 490.

25. *Law of the case—decision on reserved questions.*

The rule generally referred to as the law of the case does not apply to interlocutory decisions and decisions on reserved questions so as to prevent this court from re-examining the same question when the case comes before it on a subsequent appeal. *Rosenbledt v. Wodehouse*, 561, 564.

26. *Assignment of errors—sufficiency.*

An assignment of error general in its nature and indefinite is not sufficient and will not be considered. *Kahepu v. King*, 577.

27. *Bond on error.*

The requirement in the statute (Sec. 6 of Act 44 S. L. 1919) making it necessary where there is a money judgment that a bond shall be filed in favor of the prevailing party obviously refers to

APPEAL AND ERROR—Continued.

a money judgment in favor of the appellee. Where the only money judgment recovered in the cause is in favor of the plaintiff in error a bond to require the payment of the judgment would serve no useful purpose and no bond is required as a prerequisite to the writ. *Stewart v. Spalding*, 644.

28. *Sufficiency of notice.*

A notice of appeal not signed by the appellant nor by any one on his behalf is insufficient. *Lew Chew Tai v. Tom Choy*, 700.

29. *Exceptions—rejected evidence—record.*

This court will not consider an exception to the sustaining of an objection to a question when the record does not disclose any offer to show what the answer would be and that the answer would be material and competent evidence. *De Freitas v. De Freitas*, 717.

30. *Exceptions.*

An exception which does not bring to the attention of this court some specific question of law which was presented to the lower court is too general to be considered by this court. *De Freitas v. De Freitas*, 717.

31. *Effect of sustaining exception.*

When an exception is sustained and notice thereof is received by the circuit court it is the duty of the circuit court as a matter of law and not in consequence of any direction of this court to give effect to our decision. *Wong Wong v. Skating Rink*, 739, 742.

32. *Effect of sustaining exception which goes to the merits.*

If the exception sustained goes to the merits of the case, that is, constitutes such a holding as necessitates a certain judgment, there is nothing left but to enter such a judgment, hence the sustaining of an exception to an order overruling a motion for nonsuit on the ground that there was nothing due the plaintiff when the suit was filed left nothing for the circuit court to do but enter the judgment of nonsuit. *Wong Wong v. Skating Rink*, 739, 744.

33. *Effect of sustaining exception—circuit court may look to opinion to ascertain effect of decision.*

The effect of sustaining an exception without directions depends upon the grounds on which it is based as expressed in the opinion of the court and the circuit court in order to ascertain the effect may look not only to the formal notice transmitted to it but to the whole record, including our opinion. *Wong Wong v. Skating Rink*, 739, 743.

34. *Presumptions.*

The Supreme Court approaches a case with the assumption that no error has been committed on the trial and the burden of showing error is upon the plaintiff in error. *Ter. v. Kobayashi*, 762, 766.

35. *Rehearing.*

Except where a decision is in conflict with an express statute or with a controlling decision to which the attention of the court was

APPEAL AND ERROR—Continued.

not drawn a petition for rehearing should show clearly that some question decisive of the case and duly submitted by counsel has been overlooked by the court. *Ter. v. K. Kobayashi et als.*, 776.

36. *Party not appealing not to be heard.*

It is elementary that where a party to a suit does not appeal from the decree entered therein he must be held to acquiesce in it and cannot be permitted to ride into an appellate court upon the appeal of another party to the suit, except that under certain circumstances not existing in this cause a nonappealing party may be heard in the appellate court on the appeal of another by virtue of Act 45 S. L. 1919. *Castle v. Irwin*, 786, 788.

37. *Trustees' right of appeal.*

It is the general rule that executors, administrators and trustees are in their official capacity indifferent persons as between the real parties in interest and they cannot litigate the interest of one of such parties as against the other at the expense of the estate. *Castle v. Irwin*, 786.

38. *Appealing party must have interest.*

A party to a suit cannot appeal from a judgment or decree if he is not thereby affected. While section 2508 R. L. 1915 is extremely broad it requires that the appellant in order to entitle him to prosecute an appeal must be aggrieved by the judgment or decree complained of. *Castle v. Irwin*, 786.

39. *Order overruling motion to open default—interlocutory appeal.*

A party may not as a matter of right appeal from an order refusing to grant a motion to open default. *Kahue v. Palaualelo*, 805.

40. *Order overruling motion to open default—interlocutory appeal.*

An appeal from an interlocutory order must be allowed by the judge of the circuit court as provided for in Sec. 2508 R. L. 1915, and in the absence of such allowance the appeal will be dismissed on motion. *Kahue v. Palaualelo*, 805.

41. *Party appealing must have interest.*

The appellate jurisdiction of this court can only be invoked by a party aggrieved by the decision, judgment, order or decree appealed from. *Castle v. Irwin*, 807, 810.

42. *Party appealing must have interest—Act 45 S. L. 1919 construed and applied.*

Act 45 S. L. 1919 provides that "In case the decision, judgment, order or decree sought to be reviewed was rendered against two or more persons . . . all such cases shall be determined as if all such persons had joined in the appeal;" but where the decree appealed from is not against one of the parties he cannot prosecute an appeal nor will he be permitted to be heard upon the appeal of some other party against whom the decree was rendered. *Castle v. Irwin*, 807, 810.

APPEAL AND ERROR—Continued.

43. *Instruction.*

Where the instruction is not couched in the identical language of the statute and might be misunderstood the mere saving of an exception to it without request for further instructions presents no error on appeal. *Ter. v. Chee Siu*, 814, 819.

44. *Rejected evidence.*

The refusal of the trial court to allow an answer to a question propounded by counsel for the defendant to a witness is not reversible error when the record does not disclose any offer to show what the answer will be and that the answer would be material and competent evidence. *Ter. v. Chee Siu*, 814, 819.

See CRIMINAL LAW, 5. 6; DIVORCE, 3; HABEAS CORPUS, 1, 2, 3; TRIAL, 9, 10, 11, 12, 15.

APPEARANCE.

1. *Effect of special appearance.*

A defendant may appear specially and move to quash the service without submitting himself to the jurisdiction of the court other than for the purpose of prosecuting his motion. *Hoomana Naauao v. Makekau* 597, 602.

APPROPRIATIONS.

See TERRITORY, 1, 2.

ASSIGNMENTS.

1. *Public officers—salaries.*

An assignment by a public officer of his unearned or anticipated salary is void as being against public policy. *First Bank of Hilo v. Maguire*, 43, 48.

ASSUMPSIT.

1. *Premature action.*

An action of assumpsit cannot be maintained on a demand not due at the commencement of the action *Wong Wong v. Skating Rink*, 347, 352.

ATTACHMENT.

1. *Motion to dissolve—exemption of property levied on as ground.*

It is not a sufficient ground for dissolving a writ of attachment that the property levied upon is exempt from seizure under the writ. *Moses v. Nobriga*, 483, 493.

ATTORNEY AND CLIENT.

1. *County attorney—appearance for county officer.*

A county attorney being elected by the people and his duties prescribed by statute is not subject to the orders of the board of supervisors and may in a proper case represent an officer of the

ATTORNEY AND CLIENT—Continued.

county when sued in his official capacity although instructed not to do so by the board of supervisors. *Holt v. Conkling*, 335, 346.

2. *Authority of attorney.*

The acts which an attorney is authorized to do by virtue of his employment include the taking of all steps in the regular progress of litigation, including even the giving up of technical, although substantial, advantages. *Scott v. Pilipo*, 386, 390.

3. *Unauthorized act—waiver.*

If in the course of his employment an attorney does an unauthorized act and the client does not within a reasonable time after becoming aware of it disaffirm said act he is deemed to have waived his objection thereto. *Scott v. Pilipo*, 386, 390.

4. *Suspension and disbarment—parties.*

A proceeding under Act 19 S. L. 1919 to disbar a district court practitioner may be instituted by the attorney general and his complaint may be verified upon information and belief. *In re Manlapit*, 547, 551.

5. *Suspension and disbarment—relation of attorney and party aggrieved.*

The relation of attorney and client need not exist between the attorney and the party aggrieved in order to make the misconduct of the attorney ground for disbarment. *In re Manlapit*, 547, 553.

6. *Suspension and disbarment—nature of act charged.*

The act with which the attorney is charged as ground for disbarment must be of such a nature as to reflect upon his professional character but need not constitute a criminal offense. *In re Manlapit*, 547, 553.

7. *Suspension and disbarment—nature of act charged.*

Any act which imports fraud or dishonesty on the part of an attorney or any other gross misconduct which would reflect upon his professional character constitutes sufficient grounds for disbarment. *In re Manlapit*, 547, 553.

8. *Suspension and disbarment—sufficiency of complaint.*

The complaint in this case does not allege facts sufficient to charge the respondent with fraud or deceit or other gross misconduct meriting disbarment. *In re Manlapit*, 547.

See COURTS, 5, 6, 7, 8; DIVORCE, 7, 8, 9.

ATTORNEY GENERAL.

See ATTORNEY AND CLIENT, 5.

AUTOMOBILES.

See INDICTMENT AND INFORMATION, 4.

BANKRUPTCY.**1. *Jurisdiction of courts of bankruptcy.***

District courts of the United States as courts of bankruptcy have jurisdiction to determine the validity of a mortgage executed by the bankrupt whether the alleged invalidity is due to provisions of the bankruptcy act, the common law or statutory enactment. *Lufkin v. Grand Hotel Co.*, 150, 156.

2. *Effect of adjudication by bankruptcy court.*

Where the petitioning creditors in an involuntary bankruptcy proceeding elect to litigate in the bankruptcy court the validity of a mortgage given by the bankrupt neither they nor the trustee who represents them will again be heard upon the same issue in another court. *Lufkin v. Grand Hotel Co.*, 150, 156.

BANKS AND BANKING.

See NEGOTIABLE INSTRUMENTS, 6.

BILLS AND NOTES.

See NEGOTIABLE INSTRUMENTS.

BILLS OF LADING.

See NEGOTIABLE INSTRUMENTS, 3.

BONDS.

See APPEAL AND ERROR, 5, 6, 27; CORPORATIONS, 1; NEGOTIABLE INSTRUMENTS, 1, 2; PRINCIPAL AND SURETY, 2.

CANCELLATION OF INSTRUMENTS.**1. *Rescission of executed contract of sale.***

Where a contract for the sale of land has been executed by an act of conveyance a court of equity will not rescind the contract on account of the mere defect of title except in case of fraud or some other recognized equitable ground but will leave the party to his remedy upon the covenant in his deed. *Williams v. Boeynaems*, 589.

2. *Rescission of executed contract of sale.*

In order to constitute a ground for a rescission of the contract because of fraudulent misrepresentations the misrepresentations must be of fact and not of law for misrepresentation or mistake of law will not vitiate a contract where there is no misrepresentation of the facts. *Williams v. Boeynaems*, 589.

CARRIERS.**1. *Duty to warn passenger of danger—instruction.***

In an action for damages for personal injuries by a passenger against the owner of a vessel an instruction to the effect that it was the duty of the officers in charge of the vessel to warn him of any danger which may be apprehended or foreseen with refer-

CARRIERS—Continued.

ence to the place of riding, and which fails to tell the jury that there was no duty to warn him if the conditions which constituted the danger were as observable by him and as obvious to him as they were to them is erroneous. *Kaili v. I.-I. S. N. Co.*, 777. See APPEAL AND ERROR, 16.

CHATTEL MORTGAGES.

1. *Liability of purchaser of mortgaged chattel without consent of mortgagee.*

One who converts to his own use a chattel subject to a duly recorded chattel mortgage without the consent of the mortgagee is liable to the mortgagee for its value. *Damon v. Reliable Trans. Co.*, 99, 105.

COMMERCIAL PAPER.

See NEGOTIABLE INSTRUMENTS.

COMMON LAW.

1. *Adoption in Hawaii.*

In adopting the common law in Hawaii that portion which had been rejected by Hawaiian decisions was not adopted. *Kahanamoku v. Advertiser*, 701, 708.
See DIVORCE, 9.

COMPROMISE AND SETTLEMENT.

1. *Admission by.*

The compromise of a suit neither admits the validity of the claim urged nor ascertains any amount as being due and amounts to no more than saying that so much is paid to be rid of the controversy. *First Bank of Hilo v. Maguire*, 43, 49.

CONSTITUTIONAL LAW.

See MUNICIPAL CORPORATIONS, 3.

CONTEMPT.

1. *Record.*

A recital in the mittimus that the accused "in a contemptuous and insulting manner . . . made certain statements intimating and intending to intimate, the incompetency of the judge," etc., is not a compliance with the provisions of sec. 4056 R. L. 1915 which provides that "Whenever any person shall be adjudged guilty of any contempt or sentenced therefor, the particular circumstances of the offense shall be fully set forth in such judgment and in the order or warrant of commitment." *In re Bevins*, 544.

2. *Record.*

The language itself should be set out in the mittimus to enable the reviewing court to determine whether the judge of the court

CONTEMPT—Continued.

below properly assumed that the petitioner intimated, or intended to intimate, the incompetency of the judge. *In re Bevins*, 544.

3. *Legislative authority.*

The right to punish for direct contempt is inherent in every court of record and it is doubtful if that right can be taken away by legislative enactment, but the procedure is purely statutory and compliance with the statute in respect thereto must be had. *In re Bevins*, 544, 547.

CONTRACTS.

1. *Modification—requisites of modifying agreement.*

It is competent for the parties to a simple contract in writing to modify it or to vary or qualify its terms by oral agreement and thus make it a new one, but the agreement must have all the requisites of a valid or enforceable agreement or it will not be binding. While no particular form is required mere indefinite expressions cannot constitute a modification. *Lo v. Trust Co.*, 185, 187.

2. *Personal service.*

A contract for the cultivation of sugar cane giving the cultivator possession and control of real property, which possession is only limited by right of the owners to require the cultivator to care for crops in a husband-like manner is not a contract for personal service within the meaning of section 10 of the Organic Act. *Van Giesen v. Achi*. 558, 561..

3. *Construction.*

The court will not resort to a technical construction of a contract in order to ascribe to it a different meaning from that given it by the parties. *Sumitomo v. Hawaii Nosan*, 691, 692.

See INSURANCE, 1; MUNICIPAL CORPORATIONS, 1, 2, 6, 7, 8, 9, 10.

CONVERSION.

See TROVER AND CONVERSION.

CORPORATIONS.

1. *Bonds.*

A corporate bond payable to bearer and secured by a mortgage trust deed is a negotiable instrument. *Phoenix Lodge v. Trust Co.*, 159, 162.

2. *Meetings—call.*

A call of a corporate meeting in the legal sense of the term is a summons or notice to the parties entitled to meet directing them to do so. *Hoomana Naauao v. Makekau*, 418, 421.

3. *Meetings—call.*

Where the power to call a corporate meeting is vested in either of two officials of a corporation the one first legally exercising the

CORPORATIONS—Continued.

power in a given case does so to the exclusion of the other. *Hoomana Naauao v. Makekau*, 418.

4. *Meetings—call.*

The by-laws of the corporation provide that the annual meeting may be called by the president or by the board of trustees. The board met May 11 and decided to call the meeting for July 28. The president on June 20 issued and had published a call of the convention for July 21. The board did not publish or otherwise give notice of its call until June 27. Held, that the publication of the notice constituted the call and the call of the president being published first was therefore the legal call. *Hoomana Naauao v. Makekau*, 418.

See also MUNICIPAL CORPORATIONS; TAXATION, 16, 21, 22, 23, 24.

COSTS.

1. *Equity cases—on appeal.*

Sec. 2548 R. L. 1915, which provides that "if the defendant against whom judgment is rendered appeal and the amount recovered in the court below be reduced one-fifth or more costs shall be awarded to the appellant," governs the allowing and taxing of costs on appeal in equity cases, and where the decree appealed from is reduced one-fifth or more the appellant is entitled to his costs of appeal. *McCandless v. Castle*, 182.

See APPEAL AND ERROR, 12, 13.

COUNTIES.

See INDICTMENT AND INFORMATION, 2; MUNICIPAL CORPORATIONS; TAXATION, 17.

COURTS.

1. *Opinions on moot questions.*

An appellate court will not give opinions on moot questions or abstract propositions or declare principles or rules of law which cannot affect the matter in issue. *In re Brandt*, 51.

2. *Rules of.*

The rule of the Supreme Court authorizing dismissal of an appeal for failure to comply with its terms leaves it discretionary with the court whether the extreme penalty shall be imposed. *In re Kiolo-ku*, 170; *Stewart v. Spalding*, 745.

3. *Power of to prescribe rules.*

The power of a court to make rules for governing the practice and conducting the business of the court is always subject to the limitation that such rules must not contravene a statute or the organic law. *Ter. v. Kauhane*, 307.

COURTS—Continued.

4. *District courts—jurisdiction in criminal cases where title to real estate may be involved.*

Section 2297 R. L. 1915 which provides that district courts shall not have cognizance of real actions nor actions in which the title to real estate shall come into question, as amplified by Rule 15 of the supreme court, has application solely to civil cases. *Ter. v. Makanoa*, 556.

5. *Attorneys—disbarment.*

By the provisions of section 2331 R. L. 1915 circuit courts in this Territory possess the authority to dismiss attorneys from the roll of practitioners, at least so far as the roll of the court acting is concerned. *Bevins v. Burr*, 570, 573.

6. *Attorneys—disbarment.*

The power to disbar an attorney rests upon very different grounds from the power to punish for contempt. *Bevins v. Burr*, 570, 574.

7. *Attorneys—disbarment.*

An attorney holds his office during good behavior and can only be deprived of it for misconduct ascertained and declared by a court of competent jurisdiction after opportunity to be heard has been afforded the accused. *Bevins v. Burr*, 570, 575.

8. *Attorneys—disbarment.*

Where the judge of the circuit court called the attention of the attorney general to certain alleged misconduct of the attorney and requested him to investigate the matter and to prefer charges against the attorney in the supreme court if in his opinion the facts warranted, the judge of the circuit court was entirely without jurisdiction to prejudge of the guilt of the accused and to summarily suspend his license without a hearing. *Bevins v. Burr*, 570, 575.

9. *Alias summons.*

District courts are created by statute and are of limited jurisdiction. They possess no authority to issue an alias summons after the return day of the original has expired. *Hoomana Naauao v. Makekau*, 597, 602.

10. *Jurisdiction in equity matters.*

Under section 2472 R. L. 1915 the several circuit courts throughout the Territory possess jurisdiction of matters where relief in equity is prayed for without regard to where the rem is located or where in the Territory the parties may reside. *Hee Fat v. Chang Chip*, 623, 625.

11. *Jurisdiction in equity matters.*

But a complainant in equity does not enjoy as a matter of right a roving commission to institute and maintain his suit in any of the circuit courts which he may choose. *Hee Fat v. Chang Chip*, 623, 626.

COURTS—Continued.

12. *Jurisdiction in equity matters.*

Where concurrent jurisdiction in equity cases is reposed in several courts whether that jurisdiction will be exercised or declined by one of such courts rests largely in the discretion of the judge and depends upon the circumstances of each case. *Hee Fat v. Chang Chip*, 623, 627.

13. *Jurisdiction in equity matters.*

The attempt of the petitioner in the present case to draw the respondents away from the jurisdiction where all the parties reside was properly held by the judge of the court below to be inequitable and unjust. *Hee Fat v. Chang Chip*, 623, 627.

See BANKRUPTCY, 1.

COVENANTS.

1. *For repairs.*

A covenant requiring a lessee to make such repairs as are required by law is not broken by failure to make repairs unless such repairs are required by law. *von Hamm-Young v. Hawaii Garage*, 253, 256.

See LANDLORD AND TENANT, 1, 2, 3, 4.

CRIMINAL LAW.

1. *Evidence—exhibits.*

In a trial of two defendants, indicted jointly of the crime of larceny of one red colored steer it appeared in evidence that certain butchers' tools, some of which were identified as having recently been in possession of one of the defendants, were found in close proximity to where the steer was found tied; that both defendants were seen in close proximity to the tied steer prior to the finding of the tools; that a dog identified as belonging to one of the defendants was baying the steer when first seen and the next morning was lying on the bundle of tools. Held, that under these circumstances it was not error to admit the said tools as exhibits in the case. *Ter. v. Marks*, 219, 222.

2. *Trial—public trial—what constitutes.*

Under the Sixth Amendment to the United States Constitution declaring that in all criminal prosecutions the accused shall enjoy the right to a public trial it is error to exclude all persons excepting officers of the court and any one particular person whom the defendant would like to have present. *Ter. v. Scharsch*, 429.

3. *Trial—public trial—what constitutes—presumption of enforcement of order.*

In the absence of a showing to the contrary it is to be presumed that an order excluding the public from the courtroom during a criminal trial was enforced and that it was prejudicial to the rights of the defendant. *Ter. v. Scharsch*, 429, 430.

CRIMINAL LAW—Continued.

4. *Trial—public trial—what constitutes—denial of constitutional right—presumption of prejudice—burden of proof.*

Where a defendant is denied the constitutional right of a public trial he is presumed to be prejudiced and the burden is not upon him to show injury by reason of the deprivation. *Ter. v. Scharsch*, 429, 436.

5. *Verdict—sufficiency of evidence to sustain.*

Where in a criminal prosecution the jury upon evidence which the law recognizes as sufficient finds the defendant guilty it is beyond the province of this court to disturb the verdict. *Ter. v. Barques*, 521.

6. *Verdict—sufficiency of evidence to sustain.*

The question for our determination is not whether we would or would not have convicted the defendant upon the evidence as disclosed by the record before us but whether there was evidence sufficient to support the verdict as returned. *Ter. v. Barques*, 521, 527.

7. *Former jeopardy.*

Where the jury found the accused not guilty of the offense charged but of a lower one which is included in it and upon an appeal from that judgment by the accused a reversal is had in the appellate court the accused can again be tried for the greater offense set forth in the indictment. *Ter. v. Gamaya*, 581.

8. *Former jeopardy.*

Neither the court nor the jury is limited upon a new trial to a consideration of the question of the guilt of the lower offense of which the accused was convicted on the first trial, but the reversal of the judgment of conviction opens up the whole controversy and acts upon the original judgment as if it had never been. *Ter. v. Gamaya*, 581, 583.

9. *Former jeopardy.*

The accused by his own action has obtained a reversal of the whole judgment and upon a new trial he may be proceeded against as if no trial had previously taken place. *Ter. v. Gamaya*, 581, 583.

See FISH, 1.

CROWN LANDS.

1. *Effect of designating lands as such.*

Designating certain lands as crown lands had the effect of appropriating them and reserving them from sale except by legislative authority. *Ter. v. Gay & Robinson*, 651, 666.

DAMAGES.

See LIBEL AND SLANDER, 2; TROVER AND CONVERSION, 6.

DEEDS.

1. *Rules of construction—favoring validity.*

An instrument intended to operate as a deed should so operate if it is not legally impossible for it to do so. *Moranho v. De Aguiar*, 267, 269.

2. *Construction.*

Even though an instrument is indefinite and admits of two constructions an interpretation which will give the deed force will be adopted in preference to one which will make it of no effect. *Moranho v. de Aguiar*, 267, 269.

3. *Construction.*

Where a conveyance cannot operate in one form it will be held to operate in that form in which by law it will effectuate the intention of the parties. *Moranho v. de Aguiar*, 267, 269.

4. *Construction.*

In case of a grant to "E, her lawfully begotten children, their heirs and assigns," without such words as "after her decease" and E has no children at the time of the grant, the words "lawfully begotten children" become words of limitation and at common law E would take an estate tail. *Rosenbledt v. Wodehouse*, 561, 566.

5. *Construction.*

But since estates tail cannot be created or exist here E will be held to take an estate in fee simple unless in order to give effect to other provisions of the deed a different holding is necessary. *Rosenbledt v. Wodehouse*, 561, 566.

6. *Construction.*

Where such deed contains an additional provision forbidding E from selling the land it will more nearly carry out the expressed intention of the grantor to hold that E took a life estate with remainder in fee to her lawfully begotten children. *Rosenbledt v. Wodehouse*, 561, 569.

7. *Leases—merger.*

Where a lessee for years acquires the fee in the property leased the lesser estate is merged in the greater. *Foster v. Waiahole Water Co.*, 726, 733.

8. *Right of grantee to rentals.*

The existence of a lease in no sense prevents conveyances of the property demised, and a grant of demised property carries with it as an incident of ownership the right to the rent. *Foster v. Waiahole Water Co.*, 726, 733.

DEFAULT.

See APPEAL AND ERROR, 8, 9, 10, 39, 40; SET OFF AND COUNTERCLAIM, 2.

DEMAND.

See MECHANICS LIENS, 2; TROVER AND CONVERSION, 1, 2.

DENTISTS.

See PHYSICIANS AND SURGEONS, 1.

DISMISSAL AND NONSUIT.

1. *Voluntary termination—necessity of leave of court.*

A formal order or judgment of the court is unnecessary to enable a plaintiff to discontinue his suit before trial but the consent of the court, either express or implied, is necessary. *Yee Hop v. Nakuina*, 205, 214.

2. *Action to quiet title—failure of plaintiff to prove title.*

The plaintiff having failed to prove the title in or to the land in dispute, there being nothing to authorize a litigation of the title between codefendants, the only judgment which the court was authorized to render was to nonsuit the plaintiff. *Kaluhiwa v. Miguel*, 246, 250.

3. *Action to quiet title—failure of plaintiff to prove title.*

In an action to quiet title under the statute it is incumbent upon the plaintiff to prove a title in or to the land in dispute and if he fails to do so it will be unnecessary for the defendant to make any showing. *Kaluhiwa v. Miguel*, 246, 250.

See EQUITY, 3, 4; TRIAL, 6, 7, 15.

DISTRICT MAGISTRATES.

See COURTS, 4, 9.

DIVORCE.

1. *Alimony.*

The supreme court will not grant a motion for temporary alimony, and expenses and costs of appeal *in limine*, when a motion in the lower court of a similar character has been considered and denied and the ruling on such motion will be considered upon the appeal. *Sanderson v. Sanderson*, 172.

2. *Review of evidence on appeal.*

In cases turning wholly or largely on the credibility of witnesses and the weight of evidence much weight will ordinarily be accorded the findings of the trial judge. *Mary Sanderson v. Thomas Sanderson*, 274, 276.

3. *Allowance of expense money to prosecute appeal.*

Where an application is made to the trial court for an order allowing expense money to be incurred by the wife in order to prosecute an appeal to this court from a decree adverse to her there can be no reversal if the court below exercised its sound discretion in the premises, even granting that such an allowance is authorized under the provisions of section 2935 R. L. 1915. *Mary Sanderson v. Thomas Sanderson*, 274, 277.

4. *Alimony.*

A decree of divorce has the effect of rescinding and annulling an order for temporary alimony. *Sanderson v. Sanderson*, 274, 277.

DIVORCE—Continued.

5. *Definition.*

- The term "divorce" in its accurate sense denotes dissolution or suspension by law of the marital relation. The expression is broad and comprehensive and includes every kind of divorce recognized by the statutes of the Territory. *Springer v. Thompson*, 638, 642.

6. *Cross-libel.*

Where a party sets in operation the machinery of the law for the purpose of obtaining a divorce, and without regard to whether the divorce sought be complete dissolution or merely suspension of the marital relations, the other party may interpose a cross-libel and have relief thereon as fully and effectually as in an original petition for divorce. *Springer v. Thompson*, 638, 643.

7. *Attorney's fee on appeal—allowance by supreme court.*

This court has incident to its appellate jurisdiction in matters of divorce and separation the authority after an appeal has been perfected to require the husband in a proper case to advance to the wife a sum sufficient to put her on an equality with him in the matter of employing counsel to represent her on appeal. *Gomes v. Gomes*, 793, 797.

8. *Attorney's fee on appeal—application of Sec. 2935 R. L. 1915.* Sec. 2935 R. L. 1915 deals only with the authority of circuit judges at chambers to grant alimony and expenses of trial and is neither a grant of authority to, nor a limitation upon the authority of, this court to allow the wife an attorney's fee after the cause reaches this court on appeal. *Gomes v. Gomes*, 793, 795.

9. *Attorney's fee on appeal—principles governing allowance.*

The principles of the common law govern this court in determining whether or not in a given case the wife is entitled to an allowance to enable her to employ counsel to represent her on appeal. *Gomes v. Gomes*, 793.

See STATUTES, 7.

DOWER.

1. *Personalty.*

Under Section 2977 R. L. 1915 the widow is entitled to one-third part of the movable effects in possession or reducible to possession of her husband at the time of his death after the payment of his just debts. *Estate of Castle*, 38.

2. *Personal property.*

The term "movable effects in possession or reducible to possession" is less comprehensive than the phrase "personal property." *Estate of Castle*, 38, 40.

3. *Life insurance.*

The proceeds of policies of insurance upon the life of the husband

DOWER—Continued.

which were made payable to his executors, administrators or assigns and collected by them subsequently to his death were not his movable effects in possession or reducible to possession at the time of his death and the widow possesses no dower right therein. *Estate of Castle*, 38, 42.

4. Definition.

A dower right is an interest in real property not subject to the testator's disposition and is not a transfer of or a succession to property of her husband. *Estate of Castle*, 108, 116.

See TAXATION, 3; WILLS, 7.

EASEMENTS.

See TENANCY IN COMMON, 3.

EJECTMENT.**1. Tenancy in common—judgment.**

The rule obtaining in this jurisdiction is that a plaintiff who has been ousted may in an action in ejectment have judgment to the extent of the title proved by him as against his cotenant in possession. *Moranho v. de Aguiar*, 271, 272.

2. Parties plaintiff.

In an action in ejectment the fact that the complaining party is the Territory does not affect the general rule that the State is always at liberty to avail itself of all remedies which the law allows to every person, natural or artificial, for the vindication and assertion of its rights. *Ter. v. Gay & Robinson*, 651, 666.

ELECTIONS.**1. Duty of canvassing officer ministerial.**

In the matter of canvassing the returns and issuing certificates of election the duty of the canvassing officer is purely ministerial. *Kumalae v. Kalauokalani*, 1, 8.

2. Certificate of—mandamus—eligibility not an issue.

In a mandamus proceeding to compel the canvassing officer to issue a certificate of election to the one who on the face of the returns has the highest number of votes the petitioner's eligibility to be elected is not an issue. *Kumalae v. Kalauokalani*, 1, 16.

3. Issuance of certificate to another no defense.

The wrongful issuance of a certificate to a candidate not receiving the highest vote is not a defense in a mandamus proceeding by the party rightfully entitled thereto. *Kumalae v. Kalauokalani*, 1, 13.

4. Canvassing officer has no right to inquire into eligibility.

The canvassing officer has no right to go behind the returns and inquire into the eligibility of a candidate but must issue a certificate of election to the one who on the face of the returns has the highest number of votes. *Kumalae v. Kalauokalani*, 1.

ELECTIONS—Continued.

5. *Mandamus to compel issuance of certificate—defense.*

It is no defense to a mandamus proceeding to compel the canvassing officer to issue and deliver to petitioner a certificate of his election that one other than the petitioner has taken possession of and is holding the office for which petitioner sought a certificate of election. *Kumalae v. Kalauokalani*, 36.

EQUITY.

1. *Laches.*

The question of laches does not depend upon the fact that a certain definite time has elapsed, but whether under all of the circumstances petitioner is chargeable with a want of due diligence. *Hurst v. Kukahi*, 194, 196.

2. *Partition—trial of title.*

Before a court of equity will assume jurisdiction in a suit for partition the legal title of the property must first be set at rest. *Moranho v. De Aguiar*, 271, 273.

3. *Dismissal of bill—practice.*

Where the bill of complaint is to be attacked for reasons extraneous of the record the correct mode of procedure is by the interposition of a proper plea and not by motion to dismiss. *Nahaolelua v. Fern*, 423, 425.

4. *Dismissal of bill—practice.*

The rule obtaining in this jurisdiction is that where the bill itself is deficient the proper defense is by way of demurrer. If for reasons appearing upon the face of the bill the suit ought not to be maintained a plea in abatement or other appropriate plea should be interposed. *Nahaolelua v. Fern*, 423, 425.

5. *Laches—statute of limitations.*

The question of laches does not depend, as does the statute of limitations, upon the fact that a certain definite time has elapsed since the cause of action accrued, but whether under all of the circumstances of the particular case complainant is chargeable with a want of due diligence in failing to institute suit before she did. *Houghtailing v. De la Nux*, 438, 443.

6. *Statute of frauds.*

Courts of equity will in a proper case intervene to enforce a verbal contract notwithstanding the statute of frauds. *Yee Hop v. Young Sak Cho*, 494, 500.

See CANCELLATION OF INSTRUMENTS, 1, 2; COURTS, 10, 11, 12, 13; FRAUDS, STATUTE OF, 1, 2.

ESTATES.

1. *Annuities—residuary estates.*

Where an annuity is payable out of the residuary estate of a

ESTATES—Continued.

testator the probate court has jurisdiction to set apart a sufficient sum to answer the annuity and to pay the remainder of the residue to the residuary legatee, and this jurisdiction will be exercised in a proper case notwithstanding the opposition of the annuitant. *Estate of Brown*, 327.

See EXECUTORS AND ADMINISTRATORS, 1, 2, 3, 4.

ESTATES TAIL.

See DEEDS, 4, 5.

EVIDENCE.

1. *Presumptions.*

A material fact, if not alleged, is presumed not to exist. *McCandless v. Castle*, 22, 34.

2. *Pedigree—declarations.*

Before a declaration can be received in evidence the relationship of the declarant with the family must be established by proof independent of the declaration itself. *Estate of Liliuokalani*, 127.

3. *Presumptions.*

The presumption that everyone is *compos mentis*, in the absence of proof to the contrary, must be held to prevail in this Territory. *Estate of Lopez*, 197, 201.

4. *Stipulation—effect of stipulation.*

When parties to an action stipulate certain facts to be true and further stipulate that certain witnesses if called would testify to other facts, both the facts stipulated to be true and the facts which it is stipulated the witnesses would testify to if called are before the court as evidence when the stipulation is filed. *Kaluhiwa v. Miguel*, 246, 250.

5. *Record—marriage.*

A marriage record kept by a priest and produced from the custody of his successor who is custodian of the record is admissible without proving that the entry was made by the priest who performed the marriage ceremony. *Akono v. Kaluai*, 392, 395.

6. *Of marriage.*

Any evidence which is admissible, in those jurisdictions which recognize a common law marriage as valid, to corroborate the evidence of such marriage is also admissible to corroborate the evidence of a ceremonial or statutory marriage. *Akono v. Kaluai*, 392, 394.

7. *Sufficiency.*

A mere scintilla of evidence is insufficient to support a finding of fact and to amount to more than a mere scintilla the evidence must be of a character sufficiently substantial in view of all the circumstances of the case to warrant the jury (or judge) as trier

EVIDENCE—Continued.

of the facts in finding from it the fact to establish which the evidence was introduced. *Makainai v. Lalakea*, 470, 476.

8. Opinions—weight.

Opinion evidence as to a signature to a deed may be legally sufficient to overcome the testimony of witnesses to the signature. *Makainai v. Lalakea*, 470, 479.

9. Hearsay.

In replevin where the defense is that the chattel was being held as a pledge it does not violate the rule against admitting hearsay testimony to permit the plaintiff to recount a conversation which he had with a third party and the alleged pledgee explaining the delivery of the chattel. *Wilson v. von Holt*, 529.

See CRIMINAL LAW, 1; JUDGMENT, 3, 4, 6; SEDUCTION, 2, 3, 4, 5; TRIAL, 14; WILLS, 8.

EXCEPTIONS, BILL OF.

See APPEAL AND ERROR, 3, 4.

EXECUTORS AND ADMINISTRATORS.**1. Rights to letters of administration—order of priority.**

Under section 2490 R. L. 1915 the first right to receive letters of administration is accorded to the wife of a deceased husband and the second right thereto is in the children of the decedent who have reached their majority, but the widow is not entitled by filing her written request for the appointment of a stranger to the estate to advance the stranger to the same class and rank which she enjoys and especially is this true under a statute which recognizes no right of nomination in those entitled to administer. *Estate of Meyer*, 613, 616.

2. Rights to letters of administration—order of priority.

Our statute requires that the order of priority contained therein be observed by the probate judge unless satisfactory cause is shown which in the eyes of the law will justify a disregard of the order of priority. *Estate of Meyer*, 613, 620.

3. Rights to letters of administration—order of priority.

A mere show of hands or a poll of the heirs of the decedent by which a majority register a preference for the appointment of a stranger to the exclusion of a son of legal age who is in all respects shown to be qualified does not in our opinion constitute a satisfactory cause. *Estate of Meyer*, 613, 620.

4. Rights to letters of administration—order of priority—effect of nomination of stranger by widow.

In the present case the widow by nominating a stranger as administrator of the estate attempted to arrogate to herself a right which the laws of this Territory do not confer, hence the effect of her action was to renounce her own right to the appointment and

EXECUTORS AND ADMINISTRATORS—Continued.

to pass it on to those within the next group in the order of priority; that is, to the children of legal age. *Estate of Meyer*, 613, 621.

See PARTIES, 1; TAXATION, 6.

EXEMPTIONS.

See ATTACHMENT, 1; TAXATION, 6.

FISH.

1. *Taking fish with nets.*

There is no statutory inhibition against the use of twine net, seine or trap to take fish in the waters of Hawaii provided the mesh or opening of the net be not less than one inch square. Food fish may not, however, be taken by means of any wire fence, wire net or wire obstruction. *Ter. v. Hirota*, 802.

FORFEITURES.

See INSURANCE, 5.

FRAUD.

1. *Proof of.*

The burden of proof on the issue of fraud is upon the party pleading it. *McCandless v. Castle*, 22, 33.

FRAUDS—STATUTE OF.

1. *Parol leases.*

Although a parol agreement to grant a lease may be void under the statute of frauds it will still be enforced in equity where there has been a substantial part performance of it though on the part of the plaintiff only if possession has been delivered and the tenant has expended money in buildings or improving the property in pursuance of the agreement. *Yee Hop v. Young Sak Cho*, 494, 503.

2. *Equity—parol leases.*

Where the lessees holding under oral leases have paid substantial premiums for the leases enjoyed by them and have pursuant to the provisions of the leases and with the knowledge and consent of the owners expended a large amount of money in improving the demised premises equity will interfere to prevent the owners from ousting the lessees in the manner prescribed in section 2754 R. L. 1915 and to prevent them from impleading the statute of frauds to invalidate the leases under which the lessees possess the premises. *Yee Hop v. Young Sak Cho*, 494, 502.

See EQUITY, 6.

FRONTAGE TAX.

See MUNICIPAL CORPORATIONS, 13, 14.

GIFTS.

1. *Gratuities inter vivos not deemed to be income.*

While gifts *causa mortis* usually fall within the scope of inheritance tax enactments Christmas gifts and other gratuities *inter vivos* are not deemed to be income and are not taxable as such under any of the existing laws of this Territory. *Frear v. Wilder*, 603, 609.

GRANTS.

See REAL ACTIONS, 1, 2, 3, 4, 5.

GUARDIAN AND WARD.

1. *Accounts—commissions.*

The investment by a guardian of money which represented capital at the inception of the trust does not constitute a final payment of such money and does not entitle the guardian to the commission which the statute provides shall be chargeable "upon the final payment thereof or any part thereof." *Re Wharton Minors*, 121.

HABEAS CORPUS.

1. *Errors and irregularities not to be reviewed by.*

It is well settled that a writ of habeas corpus will not be permitted to perform the functions of a writ of error or appeal for the purpose of reviewing errors or irregularities in proceedings of a court having jurisdiction over the person and the subject-matter. *In re Gamaya*, 414, 417.

2. *Errors and irregularities not to be reviewed by.*

Where the evidence is insufficient to support a verdict finding a defendant guilty of a crime the conviction would be voidable but not void and the defendant's remedy would be by exception or error. *In re Gamaya*, 414.

3. *Errors and irregularities not to be reviewed by.*

The writ of habeas corpus will not issue unless the court under whose warrant the prisoner is held is without jurisdiction. The writ cannot be used to correct errors. *In re Gamaya*, 414, 417.

HIGHWAYS.

See MUNICIPAL CORPORATIONS.

HOMESTEADS.

See PUBLIC LANDS, 1; TERRITORY, 1, 2.

HUIS.

1. *Shareholders are tenants in common.*

The members of a Hawaiian land hui are tenants in common of its lands in proportion to their respective ownership of shares. *Moranho v. de Aguiar*, 267, 270.

HUIS—Continued.

2. *Meaning.*

The term "hui" as employed in local parlance denotes a tenancy in common. *Foster v. Waiahole Water Co.*, 726, 730.

INDICTMENT AND INFORMATION.

1. *Motion to quash indictment and a special plea in bar distinguished.*

A motion to quash an indictment is addressed to the discretion of the court and is usually based upon matters of record. A special plea in bar presents some matter extrinsic of the record which completely bars the proceeding and in regard to which the court may exercise no discretion but is bound to sustain the plea if it be well taken. *Ter. v. Anderson*, 55, 57.

2. *Construction.*

An indictment under section 2214 R. L. 1915 which alleges in effect that the defendants who constituted the board of supervisors of a county did incur, authorize, contract and aid in incurring, authorizing and contracting liabilities and obligations for the purposes of said county in excess of the amount of money available for the purposes of said county during the fiscal year is an indictment for having incurred liabilities in excess of the amount of money available for all county purposes and is not an indictment for having incurred liabilities in excess of the amount available in any particular account. *Ter. v. Kauhane*, 381.

3. *Construction.*

An indictment should contain such a specification of the acts and descriptive circumstances as will on its face fix and determine the identity of the offense with such particularity as to enable the accused to know exactly what he has to meet. *Ter. v. Kauhane*, 381.

4. *Requisites of.*

A complaint which alleges that the defendant did unlawfully and furiously and heedless of the safety of others drive an automobile and did thereby imminently endanger the personal safety of others (without naming the person whose personal safety was imminently endangered) although substantially in the language of the statute (Sec. 4100 R. L. 1915) is insufficient. *Ter. v. Puana*, 584, 587.

5. *Sufficiency of.*

Where by the use of the words "as aforesaid" language theretofore used in an indictment is brought forward into the charging part of the indictment it is unnecessary to repeat such language but the indictment will be read as though the language thereby referred to was repeated. *Ter. v. Wills*, 747, 761.

INDICTMENT AND INFORMATION—Continued.

6. *Charging crime in different forms of expression.*

The fact that the one crime is charged more than once in equivalent or synonymous expressions is not fatal to the indictment.

Ter. v. Chee Siu, 814, 818.

See APPEAL AND ERROR, 2.

INJUNCTIONS.

See MUNICIPAL CORPORATIONS, 14.

INNKEEPERS.

1. *Liens of.*

A person not an innkeeper or warehouseman nor in the business of storing goods, who permits the property of another to remain on his premises under an agreement to pay storage, but without any agreement for a lien, has no lien for the storage at common law. *Damon v. Reliable Trans. Co.*, 98, 103.

INSURANCE.

1. *Contract of life insurance.*

A contract of life insurance is a mutual agreement by which one party undertakes to pay a given sum upon the happening of a particular event contingent upon the duration of human life in consideration of the payment of a smaller sum immediately or in periodical payments. *Estate of Castle*, 38, 41.

2. *Beneficiary—insurable interest.*

Where there are no ties of blood or marriage between the person whose life is insured and the person who procures the policy on such life there must be some pecuniary interest of the latter in the life of the former to sustain the insurance. But an indirect advantage is sufficient. It is enough that in the ordinary course of events pecuniary loss or disadvantage will naturally and probably result from the death of the one whose life is insured to the person obtaining the policy. *Rumsey v. N. Y. Life Ins. Co.*, 141.

3. *"Accidental" defined.*

The term "accidental" in its ordinary popular sense means a happening by chance or unexpectedly taking place and not according to the usual course of things nor as expected. If a result is such as follows from ordinary means voluntarily employed, in a not unusual or unexpected way, it cannot be called a result effected by accidental means, but if in the act which precedes the injury something unforeseen, unexpected, unusual occurs which produces the injury, the injury has resulted through accidental means. *Colburn v. U. S. F. & G. Co.*, 536, 539.

4. *Accidental bodily injury.*

Where blood poisoning results from an abrasion of the skin of the foot by a shoe and death or disability follows the death or disabil-

INSURANCE—Continued.

ity is properly attributable to accidental bodily injury. *Colburn v. U. S. F. & G. Co.*, 536, 539.

5. *Policy—forfeiture not favored.*

The forfeiture of an insurance policy is not favored at law and courts are always prompt to seize hold of any circumstance to uphold the validity of a policy, and where it was issued and the premium therefor paid the validity of the policy should be sustained unless fraud or other dereliction upon the part of the insured sufficient in law to vitiate it is clearly shown. *Colburn v. U. S. F. & G. Co.*, 536, 543.

See DOWER, 3.

JEOPARDY.

See CRIMINAL LAW, 7, 8, 9.

JUDGES.

See DIVORCE, 2; TRIAL, 9, 10, 11, 12.

JUDGMENT.

1. *Res judicata—pleading.*

In an attempt to plead res judicata where the pleading does not allege that the party sought to be bound was either a party to the prior proceeding relied upon or in privity with a party thereto such pleading does not raise the issue of res judicata. *McCandless v. Castle*, 22, 33.

2. *Effect on one not a party.*

We are aware of no rule of law by which one can be deprived of his title in land by a judgment rendered in a cause to which he was not a party. *Moranho v. de Aguiar*, 267, 269.

3. *Admissibility as evidence against stranger.*

A judgment is not evidence against a stranger to the suit in which it was rendered to prove the existence of any of the facts necessary to support that judgment. *Ter. v. Howell*, 320, 324.

4. *Admissibility as evidence against stranger.*

For the mere purpose of establishing the fact of its own rendition and those legal consequences which result from that fact, the judgment itself is not only admissible as the proper legal evidence but usually conclusive to prove that fact. *Ter. v. Howell*, 320, 323.

5. *Effect of.*

A judgment concludes the parties and their privies only as to the grounds covered by it and the facts necessary to uphold it. *Ter. v. Howell*, 320, 322.

6. *Effect in subsequent suit.*

A judgment in one suit will be conclusive in every other where the cause of action and the parties are the same notwithstanding a

JUDGMENT—Continued.

change in the form in which the action is brought. *Ter. v. Howell*, 320, 322.

7. *Modification of after expiration of term.*

The jurisdiction of a court over its judgments terminates with the close of the term at which they were rendered and they cannot be set aside or altered after the expiration of the term at which they were entered unless the proceeding for that purpose was begun during the term. *Rhoades v. Maciel*, 579.

See APPEAL AND ERROR, 8, 10, 11; DIVORCE, 4; EJECTMENT, 1; SET OFF AND COUNTERCLAIM, 2; WILLS, 4.

JURY.

1. *Right of trial by.*

One of the parties to a cause having waived his right to a trial by jury and this waiver having been acquiesced in by the other party the status of the cause became fixed as one to be tried without a jury and this status would remain during the life of the litigation and could only be changed by consent of both parties. *O. R. & L. Co. v. Kaili*, 378, 379.

See TRIAL, 1, 8, 13.

KONOHIKI RIGHTS.

See LAND COMMISSION, 1; WATERS AND WATERCOURSES, 1.

LACHES.

See EQUITY, 1, 5.

LAND COMMISSION.

1. *Konohiki rights.*

All the land within the boundaries of the ahupuaa not included within some ili or kuleana is a part of the ahupuaa. *Ter. v. Gay & Robinson*, 651, 657.

LANDLORD AND TENANT.

1. *Leases—covenants.*

A covenant in a lease that the lessee will during the term pay all taxes, water rates and assessments of every description which may be payable in respect of said premises to whomsoever levied or assessed is an obligation to pay assessments for street improvements even though such assessments are levied under an ordinance passed subsequent to the execution of the lease. *Estate Wilder v. I.-I. S. N. Co.*, 178.

2. *Covenants—construction.*

A lease provided that the lessee will permit the lessor at all seasonable times to enter the leased premises and examine the state of repair and condition thereof and will repair and make good all defects of which notice shall be given within thirty days after the

LANDLORD AND TENANT—Continued.

giving of such notice. Held that in the absence of such notice and a failure for thirty days thereafter to make repairs and remedy defects in the condition of the premises no right to declare a forfeiture for violation of the covenants to make repairs and keep the premises in a sanitary condition had been shown. *von Hamm-Young v. Hawaii Garage*, 253, 258.

3. *Covenants—construction.*

Covenants in a lease of land, upon the breach of which a forfeiture is claimed, must be strictly construed. *von Hamm-Young Co., Ltd., v. Hawaii Garage, Ltd.*, 253, 260.

4. *Covenants—construction.*

A lease provided that the acceptance of rent by the lessor should not be deemed to be a waiver by it of any breach by the lessee of any covenant therein contained. After a breach of covenants by the lessee known to the lessor the lessor accepted rent. Held that this provision of the lease prevented the acceptance of rent from being a waiver of the breach of covenant but did not prevent such acceptance from being a waiver of the right to declare a forfeiture for such breach. *von Hamm-Young v. Hawaii Garage*, 253, 265.

5. *Leases—mutuality.*

The ancient rule to the effect that a lease which puts it in the power of the lessee to terminate the lease at will is void for want of mutuality has long since been discarded and has no place in the present day analogies of the law of tenancies. *Yee Hop v. Young Sak Cho*, 494, 504.

6. *Right of lessees under oral lease as against subsequent purchaser—notice.*

The rule is that where a party purchases or leases real estate in the possession of another not his vendor or lessor he is chargeable with knowledge of all the rights of the party in possession and the law imposes upon him the duty to make reasonable inquiry as to the rights of persons in possession and if he fail to do so he cannot be deemed to be a purchaser in good faith for value and the provisions of section 3118 R. L. 1915 will not protect him. *Yee Hop v Young Sak Cho*. 494, 505.

See DEEDS, 5.

LARCENY.

1. *Proof of.*

The mere possession of stolen property does not constitute sufficient evidence upon which to convict the party found in possession of the stolen property of the crime of larceny. *Ter. v. Marks*, 219, 226.

See TRIAL, 2, 3.

LAW OF THE CASE.

See APPEAL AND ERROR, 17, 18, 25.

LEASE.

See LANDLORD AND TENANT, 1, 2, 3, 4, 5.

LEGISLATURE.

See MUNICIPAL CORPORATIONS, 11; OFFICERS, 3; PUBLIC LANDS, 1; TERRITORY, 2.

LIBEL AND SLANDER.

1. *Pleading—falsity of publication need not be alleged.*

It is not necessary for the plaintiff in a civil action for libel to allege the falsity of the libelous publication, but if the defendant desires to justify the publication by showing it to be true that comes in as a defense under a proper pleading in his behalf. *Kahanamoku v. Advertiser*, 701, 708.

2. *Pleading—special damages when not necessary.*

If the publication complained of is libelous *per se* special damages need not be alleged or proven but general and punitive damages may be recovered. *Kahanamoku v. Advertiser*, 701, 709.

3. *Publication libelous per se when.*

If the language used of and concerning the plaintiff (when construed to mean what persons of ordinary intelligence reading it would reasonably understand it to mean) would tend to render him contemptible or ridiculous in public estimation or expose him to public hatred or contempt it is libelous *per se*. *Kahanamoku v. Advertiser*, 701, 713.

4. *Publication libelous per se when.*

To publish of a person that he has not a sufficient job because he is a loafer or a slacker is libelous *per se* as such a charge tends to subject the person charged to social degradation and to the contempt of all right thinking people. *Kahanamoku v. Advertiser*, 701, 716.

5. *Changes in social state.*

Changes in the social state may be considered in determining whether a certain charge is libelous *per se*. *Kahanamoku v. Advertiser*, 701, 716.

LICENSES.

See MARRIAGE, 1, 2, 3.

LIENS.

1. *Common law artisan's lien—effect of voluntary delivery to owner.*

When one entitled to a lien upon a chattel for its repair voluntarily delivers such chattel to its owner the lien is extinguished. *Damon v. Reliable Trans. Co.*, 99, 104.

2. *Artisan's lien—resumption of possession does not reconstitute the lien.*

When the lien has been extinguished by delivery of the chattel

LIENS—Continued.

the lien does not revert upon possession being restored. *Damon v. Reliable Trans. Co.*, 99, 104.

See INN KEEPERS, MECHANICS' LIENS, WAREHOUSEMEN.

LIMITATION OF ACTIONS.

1. *Reformation of deed.*

Where an action was instituted in 1917 to reform on the ground of fraud a deed made in 1905, and the situation of the parties had not changed nor rights of third parties intervened it was held that the statute of limitations had not barred the action. *Hough-tailing v. de la Nux*, 438, 442.

See EQUITY, 5; REAL ACTIONS, 1, 2, 3, 4, 5.

MANDAMUS.

1. *Ministerial official duty—performance compelled by mandamus.*

Where a plain official duty, purely ministerial, requiring the exercise of no discretion, is to be performed and performance is refused, mandamus will lie upon the application of the party aggrieved to compel its performance. *Kumalae v. Kalauokalani*, 1, 8.

2. *Function of writ.*

The writ of mandamus will not issue to compel the performance of an unlawful act or to aid one in carrying out an unlawful proceeding. *Kumalae v. Kalauokalani*, 1, 9.

3. *Moot questions.*

In reviewing a decision in mandamus the judgment of the lower court will not be disturbed where by some change of circumstances since the commencement of the suit the questions litigated have ceased to have any practical importance but are academic only. *In re Brandt*, 51, 52.

4. *Office of—judicial or quasi-judicial power.*

In a mandamus proceeding to coerce a judicial officer or any person or board in the exercise of judicial or quasi-judicial power the sole legitimate purpose thereof is to set such person or board in motion; to command him or it to act, not how to act. *In re Lorigan*, 445, 451.

5. *Office of—discretion—what constitutes discretion.*

Where there is no reasonable ground to justify a decision by such officer or board other than one way a refusal to find accordingly is not an exercise of discretion but a refusal to exercise it and where there is no legal remedy the court will award its writ of mandamus to compel the person or body to find the facts in accordance with the evidence. *In re Lorigan*, 445.

See ELECTIONS, 2, 3, 5.

MARRIAGE.

1. *License.*

It is provided in section 2905 R. L. 1915 (Sec. 1870 Civ. L. 1897) that "it shall in no case be lawful for any persons to marry in this Territory without a license for that purpose duly obtained from an agent duly appointed to grant licenses to marry in the judicial district in which the marriage is to be celebrated." This provision while clearly prohibitory contains no words of nullity. *Parke v. Parke*, 397.

2. *License.*

Section 8 R. L. 1915 (Sec. 8, Civ. L. 1897), which reads: "Whatever is done in contravention of a prohibitory law is void although the nullity be not formally directed," expressly renders null whatever is done in contravention of a prohibitory law. These two sections must be considered in *pari materia*. *Parke v. Parke*, 397.

3. *License.*

A license is a prerequisite to a valid marriage in this Territory. Marriages *per verba de praesenti*, as recognized by the common law, are void here. *Godfrey v. Rowland*, 16 H. 377, holding to the contrary, overruled. *Parke v. Parke*, 397.

See EVIDENCE, 5, 6.

MASTER AND SERVANT.

1. *Period of hiring.*

The mere fact that the rate of compensation is agreed upon between master and servant at a certain sum per month does not in the absence of other evidence fix the period of hiring at one month. *Crawford v. Stewart*, 226, 238.

2. *Indefinite hiring—terminable at will of either party.*

A contract of hiring which specifies no time which it is to run, there being no facts proven from which it can be inferred that any particular time was contemplated by the parties, is a hiring for an indefinite time and may be terminated at will by either party. *Crawford v. Stewart*, 226, 237.

3. *Right of termination of contract.*

A contract of hiring in which the compensation was fixed at a stated sum per month but without any specified term of employment constituted a hiring at will and not by the month and in the absence of any established usage to the contrary either party had the right to terminate the employment at any time without notice and upon such termination the party discharged would be entitled to compensation only to the time of such termination. *Crawford v. Stewart*, 300.

See CONTRACTS, 2.

MECHANICS' LIENS.**1. Attaches when.**

Under Section 2864 R. L. 1915 the mechanic's lien does not attach until a notice thereof is filed and a copy of the notice is served upon the owner of the property. *Lewers & Cooke v. Jones*, 214, 217.

2. Demand—when must be made.

In an action to enforce a lien for materials furnished and used in the construction of a building it must appear that demand upon the owner for payment of the amount claimed under the lien was made after the lien attached and prior to the filing of suit. *Lewers & Cooke v. Jones*, 214, 217.

3. Enforcement—defense.

Any matter that would constitute a good defense to an action of assumpsit on the account which is the basis of the lien is a good defense to a suit to foreclose the lien. *Wong Wong v. Skating Rink*, 347, 352.

4. Enforcement—defense.

If it appears that the account which is the basis of the lien was not due when the suit to foreclose the lien was begun there can be no recovery, and this defense may be set up by other defendants than the debtor. *Wong Wong v. Skating Rink*, 347, 353.

MERGER.

See DEEDS, 7..

MITTIMUS.

See CONTEMPT, 1, 2.

MORTGAGES.

See CHATTEL MORTGAGES.

MOTIONS.

See INDICTMENT AND INFORMATION, 1.

MUNICIPAL CORPORATIONS.**1. Contract—acceptance.**

The acceptance of the contract by the engineer and by the board of supervisors must in the absence of fraud be regarded as conclusive. *Taylor v. City and County*, 58, 67.

2. Public improvement—contract.

Allegations of slight variances from specifications which do not affect the character of the work are not facts sufficient to establish fraud in the performance of a contract of such a nature as to warrant the intervention of a court of equity and the granting of an injunction to restrain the collection of the assessment. *Taylor v. City and County*, 58, 68.

MUNICIPAL CORPORATIONS—Continued.

3. *Assessment—constitutionality.*

Neither the relative importance of the work to the value of the land assessed nor that the assessment is unequal as regards the benefits conferred is a matter in which the local authorities are controlled by the Federal Constitution. *Taylor v. City and County*, 58, 69.

4. *Assessment—conclusiveness.*

Where a city is vested with power to determine what property is benefited by a local improvement and to assess the cost upon such property, its decision is conclusive except in case of fraud or mistake. *Taylor v. City and County*, 58.

5. *Assessment—irregularities.*

An assessment will not as a rule be set aside for minor irregularities that in no way affect substantial rights of property owners. *Taylor v. City and County*, 58.

6. *Contracts.*

Where there is a definite fund on hand and the receipt of additional funds is contemplated it is not illegal for the city and county authorities to let a contract obligating the City and County to the extent of the funds on hand and reserving the option to require additional work should the funds therefor be provided before the expiration of the period specified for the completion of the contract. *In re E. J. Lord*, 76, 84.

7. *Contracts—awarding contract for public improvement.*

In the absence of any allegation or showing of fraud or collusion on the part of the awarding authorities their decision in determining who is the lowest bidder is conclusive, the presumption being that the authorities acted faithfully and honestly and for the public good after due and full investigation of the matter. *In re E. J. Lord*, 76, 84.

8. *Contracts—calling for tenders—modification of specifications.*

Plans and specifications for work to be done by contract requiring competitive bidding therefor cannot be changed after the call for bids has been published without readvertising, but the unauthorized attempt of the city and county engineer to require supplemental bids without advertising, after publication of a call for tenders, cannot affect the plans and specifications as theretofore adopted and approved by the proper authorities and cannot affect the validity of the bids submitted nor of the contract entered into with the successful bidder. *In re E. J. Lord*, 76, 85.

9. *Contracts—time of completion of work.*

Where it is provided in the specifications that "any shortening or lengthening of the road made necessary by lack or increase of funds shall decrease or increase the period allowed for construction proportionately as may be determined by the board" and the only

MUNICIPAL CORPORATIONS—Continued.

necessity of curtailing the work that could arise would be from the lack of funds the reasonable construction of the language quoted is that the two years period specified for the completion of the entire work should be reduced in the same proportion that the money available bears to the amount of the bid. *In re E. J. Lord*, 76, 88.

10. *Contracts—method of handling excavations.*

The fact that unit prices are called for on the method of handling excavations instead of the various character of the materials to be excavated does not vitiate the specifications nor the contract based thereon. *In re E. J. Lord*, 76, 91.

11. *Debt limit.*

The Organic Act provides in effect that the legislature may authorize loans by any municipal corporation for certain specified purposes but provides that the total of such indebtedness incurred in any one year shall not exceed 1% of the assessed value of its property. Held, that this is a limitation upon the power of the legislature to authorize the incurring of indebtedness as well as upon the municipality to incur it. *Holt v. Conkling*, 335, 344.

12. *Debt limit.*

An act of the legislature transferring a water and sewer system to a city and requiring it to devote the revenues derived therefrom to the maintenance of said systems and the payment of interest and sinking fund on bonds issued by the Territory for the building of said systems and in the event of a deficiency in said revenue to make up said deficiency out of the general revenue of said city does not authorize nor require said city to incur an indebtedness. *Holt v. Conkling*, 335, 345.

13. *Penalties—frontage tax.*

Where one is called upon to pay a street assessment under the frontage tax laws, which he believes to be illegal, he has two courses open to him. He may resist payment at the hazard of all penalties in case the decision shall be against him, or he may pay the assessment under protest and then in case of a decision in his favor demand the return of the money. *Taylor v. City and County*, 632, 636.

14. *Penalties—frontage tax—injunction.*

The fact that the property holder in good faith sues out a temporary injunction restraining the City and County from collecting the assessment does not suspend the operation of the statute which levies a penalty of one per cent per month for the period of default. *Taylor v. City and County*, 632.

NEGLIGENCE.

1. *Concurrent negligence—joint liability.*

If two or more wrongdoers negligently contribute to the personal

NEGLIGENCE—Continued.

injury of another by their several acts which operate concurrently so that in effect the damages suffered are rendered inseparable they are jointly and severally liable and may be joined in one action. *Castanha v. Fitzpatrick*, 508, 515.

NEGOTIABLE INSTRUMENTS.

1. *Corporate bonds.*

A corporate bond payable to bearer and secured by a mortgage trust deed is a negotiable instrument. *Phoenix Lodge v. Trust Co.*, 159, 162.

2. *Theft—rights of true owner.*

A bona fide holder for value of a lost or stolen negotiable bond taken in the usual course of business acquires a good title thereto even as against him from whom it was stolen. *Phoenix Lodge v. Trust Co.*, 159, 164.

3. *Bills of lading.*

The bill of lading represents the goods. It is the symbol of the goods. Its negotiability is that of the goods. Thus in general the transferee of a bill of lading takes the title of the transferor just as the transferee of goods takes the title of the transferor. *Sumitomo v. Hawaii Nosan*, 646, 649.

4. *Bills of exchange—transfer by blank indorsement.*

The legal title to a bill of exchange may be transferred by blank indorsement and the holder to whom such bill is transferred has absolute control thereof. *Sumitomo v. Hawaii Nosan*, 646, 650.

5. *Bills of exchange—transfer by blank indorsement.*

The possession of a bill of exchange indorsed in blank to the payee is prima facie proof of ownership and sufficient in the absence of other evidence to entitle the holder to recover on proving the indorsement. *Sumitomo v. Hawaii Nosan*, 646, 650.

6. *Protest of foreign draft.*

A collecting bank which fails to protest a foreign bill of exchange for non-payment renders itself liable thereon to the forwarding bank. *Sumitomo v. Hawaii Nosan*, 646, 649.

NEW TRIAL.

1. *Effect of order granting.*

The granting of a new trial does not confer any new right but merely relegates the parties to their former status. *O. R. & L. Co. v. Kail*, 378, 380.

NEWSPAPERS.

See LIBEL AND SLANDER.

NON-SUIT.

See DISMISSAL AND NON-SUIT.

NOTICE.

See LANDLORD AND TENANT, 6.

NOTICE OF APPEAL.

See APPEAL AND ERROR, 28.

OFFICERS.

1. *Election of officer to another vacates first, when.*

The acceptance of an office by one already holding another, where the holding of the two offices by one person at the same time has been prohibited by law or the two offices are incompatible at common law, automatically vacates the first office held. *Hollinger v. Kumalae*, 669, 689.

2. *Election of officer to another does not vacate first, when.*

If the law does not forbid the holding of the two particular offices by one person at the same time and they are not incompatible at common law the acceptance of the second does not vacate the first and the person so elected could legally hold them both at the same time. *Hollinger v. Kumalae*, 669, 689.

3. *Acceptance by legislator of office of supervisor of City and County of Honolulu, effect of.*

Section 17 of the Organic Act prohibits any person holding office "in or under or by authority of the government of . . . the Territory of Hawaii" from holding the position of a member of the legislature while holding said office. Held, that the office of supervisor of the City and County of Honolulu is an office by authority of the government of the Territory of Hawaii and therefore the acceptance of the office of supervisor by a member of the legislature automatically vacated the office of member of the legislature. *Hollinger v. Kumalae*, 669, 689.

4. *Policeman a public officer.*

A duly commissioned and acting police officer of the City and County of Honolulu is a public officer within the provisions of section 3944 R. L. 1915. *Ter. v. Wills*, 747, 754.

5. *Special policeman without pay a public officer.*

A duly commissioned and acting special police officer without pay from any governmental authority, but paid by a private person for services in guarding private property of such person and appointed by the sheriff of the City and County of Honolulu at the request of such person, is a public officer within the provisions of section 3944 R. L. 1915 while acting under color of his commission. *Ter. v. Wills*, 747, 759.

6. *Appointment of special police officer without pay, how and by whom made.*

The sheriff of the City and County of Honolulu is authorized to appoint without the approval of the civil service commission under chapter 117 R. L. 1915 special police officers without pay. *Ter. v. Wills*, 747, 758.

OFFICERS—Continued.

See ASSIGNMENTS, 1; ATTORNEY AND CLIENT, 1; MANDAMUS, 1, 2, 3, 4, 5; STATUTES, 10, 11.

PARTIES.

1. *Substitution of personal representative for deceased plaintiff.*
When the plaintiff recovers judgment below and the case is pending in this court on appeal and plaintiff dies, upon the suggestion of his death by his personal representative said personal representative will be substituted for the deceased plaintiff. *Colburn v. U. S. F. & G. Co.*, 479; *Colburn v. Carter*, 482.

2. *Plaintiffs must have and show interest in controversy.*

It is elementary that a person appearing as plaintiff must have and show an existing remedial interest in the cause of action. *Farden v. Richardson*, 611.

See APPEAL AND ERROR, 36, 37, 38, 41, 42; ATTORNEY AND CLIENT, 4; EJECTMENT, 2; REPLEVIN, 2; TRUSTS, 1.

PARTITION.

1. *Preliminaries to suit.*

Before a court of equity will assume jurisdiction in a suit for partition the legal title of the property must first be set at rest. *Moranho v. de Aguiar*, 271, 273.

See EQUITY, 2.

PATENTS.

See PUBLIC LANDS.

PAYMENT.

See GUARDIAN AND WARD, 1; TERRITORY, 1.

PENALTIES.

See MUNICIPAL CORPORATIONS, 13, 14.

PHYSICIANS AND SURGEONS.

1. *Board of examiners—powers quasi-judicial.*

Under our statute (Sec. 1041 R. L. 1915) providing for the examination of candidates for licenses to practice dentistry the board in passing upon the qualification of candidates exercises quasi-judicial powers and its decision as to qualifications can not be controlled by mandamus unless the evidence before it will admit of but one conclusion, viz., that the candidate passed the required grade. *In re Lorigan*, 445.

PLEADING.

1. *Amendments.*

An attempt to change the nature of the action from one in contract to one in tort or vice versa is properly not an amendment but a substitution of a cause of action different in nature and substance from that originally stated and is unauthorized by the laws of this Territory. *Kupukaa v. Gray*, 189.

PLEADING—Continued.

2. Action to quiet title—cross complaint—sufficiency of.

In an action to quiet title under the statute even if the defendant may file a cross complaint against his codefendants which is doubtful a pleading of a defendant which sets up his title but fails to ask affirmative relief against his codefendants can not be regarded as a cross complaint. *Kaluhiwa v. Miguel*, 246, 252.

3. Amended pleadings.

Under the statute of amendments (Sec. 2371 R. L. 1915) it is proper for the court to allow the plaintiff to amend his complaint after all the evidence is in where the amendment serves to make the pleadings conform to the proof. *Kaili v. I.-I. S. N. Co.*, 777, 781.

See JUDGMENT, 1; SET OFF AND COUNTER-CLAIM, 1, 2.

POLICE.

See OFFICERS, 4, 5, 6.

PRESUMPTIONS.

See APPEAL AND ERROR, 21, 34; EVIDENCE, 1, 3; REAL ACTIONS, 1, 2, 3, 4, 5; WILLS, 8; WORDS AND PHRASES, 12.

PRINCIPAL AND AGENT.

See REPLEVIN, 2.

PRINCIPAL AND SURETY.

1. Probate bond—judgment against principal conclusive on sureties.

An order made by a circuit judge in probate against an executrix holding her to be indebted to the estate in a certain sum, surcharging her therewith and directing her to pay the sum into court, followed by the recovery in a court of law of a judgment upon the bond for breach of condition conclusively binds the sureties on the bond. *Colburn v. Carter*, 518, 520.

2. Subrogation.

A surety who has paid the judgment is not subrogated to the rights of his principal to the extent that he may maintain an independent action in assumpsit against third parties for whom he claims the money involved was actually expended. *Colburn v. Carter*, 518, 521.

PROCESS.

1. Copy to be served on defendant.

The copy of process served on the defendant need not be an exact counterpart of the original. Clerical errors will not affect the jurisdiction of the court when the defendant has not been misled thereby. *Hoomana Naauao v. Makekau*, 597, 599.

PROCESS—Continued.

2. *Copy to be served on defendant.*

But where the statute requires that the original process must bear the signature of the magistrate or his clerk and the purported copy is entirely unsigned it is fatally defective. *Hoomana Naauao v. Makekau*, 597, 600.

3. *Copy to be served on defendant.*

It is the copy of the summons alone that brings the party into court and he is justified in assuming that it is in all respects like the original. *Hoomana Naauao v. Makekau*, 597, 600.

4. *Appearance.*

Every defendant against whom suit is instituted must be served with proper and legal process unless by voluntary general appearance he submits himself to the court's jurisdiction. *Hoomana Naauao v. Makekau*, 597, 602.

See COURTS, 9.

PUBLIC LANDS.

1. *Improvements on—value.*

The power of ascertaining the value of improvements placed upon a homestead which has been forfeited has been lodged by Congress in the executive branch of the territorial government and it is beyond the powers of the legislature to re-examine what has been legally done by the executive. *In re Koki*, 406, 410.

2. *Patent valid on its face—subject to attack in action at law, when.*

A patent issued in due form of law, valid on its face, may be attacked and declared void in an action at law provided the evidence shows it to be void for want of authority for its issue. *Ter. v. Gay & Robinson*, 651, 664.

3. *Patent valid on its face—effect of prior grant—reservation from sale or appropriation.*

When the land covered by a patent has been previously granted, reserved from sale or appropriated the patent is void for want of authority for its issue. *Ter. v. Gay & Robinson*, 651, 664.

4. *Patents.*

When the officers of the government issue a patent to land over which they have no jurisdiction the patent is absolutely void, and the legal title to the land remains in the government. *Ter. v. Gay & Robinson*, 651, 665.

See LAND COMMISSION.

PUBLIC UTILITIES.

See APPEAL AND ERROR, 16.

QUIETING TITLE.

See DISMISSAL AND NON-SUIT, 2, 3; PLEADING, 2.

REAL ACTIONS.

1. *Statute of limitations—distinguished from the common law presumption of a lost grant.*

There is a marked difference between a title acquired by prescription under the statute of limitations and a title acquired through the medium of the common law presumption of a lost grant. *In re Title of Kioloku*, 357, 366.

2. *Statute of limitations distinguished from the common law presumption of a lost grant.*

Under the statute of limitations the rule is an arbitrary one and the presumption is conclusive, whereas the common law presumption is rebuttable. *In re Title of Kioloku*, 357, 366.

3. *Statute of limitations distinguished from the common law presumption of a lost grant.*

The statute of limitations cannot be invoked against the State but where sufficient facts are shown the common law presumption of a lost grant may be indulged in and the rule will be applied as a *presumptio juris et de jure* even as against the State. *In re Title of Kioloku*, 357, 370.

4. *Common law presumption of a lost grant.*

Where the evidence is sufficient to apply the common law presumption of a grant it may also be assumed in the absence of circumstances repelling such conclusion that all that might lawfully have been done to perfect the legal title was in fact done and in the form prescribed by law. *In re Title of Kioloku*, 357, 369.

5. *Common law presumption of a lost grant.*

The doctrine of the common law presumption of a lost grant may be invoked in favor of the State as well as against it. *In re Title of Kioloku*, 357, 365.

See COURTS, 4.

REFORMATION OF INSTRUMENTS.

See LIMITATION OF ACTIONS, 1.

RE-HEARING.

See APPEAL AND ERROR, 35.

REMAINDERS.

See DEEDS, 6; WILLS, 2.

REPLEVIN.

1. *Evidence—possession.*

When it appears that from the time plaintiff claims to have acquired title to the property in controversy from the defendant, he has had possession of said property, it is proper to show the attitude of both himself and the defendants toward that possession. *Paxson v. Schuman Car. Co.*, 719, 722.

REPLEVIN—Continued.

2. *Parties defendant—joinder of principal and agent.*

An agent or servant of a corporation may be joined with the corporation in replevin even though all that he did in the way of taking and detaining the property was merely as the agent and servant of the corporation. *Paxson v. Schuman Car. Co.*, 719, 725.

See EVIDENCE, 9; TROVER AND CONVERSION, 4.

RES JUDICATA.

See JUDGMENT, 1.

RULES OF COURT.

See APPEAL AND ERROR, 7, 12, 13; COURTS, 2, 3.

SEDUCTION.

1. *Corroboration—instruction to the jury.*

Under a statute which provides in effect that the court may charge the jury whether there is or is not evidence (indicating the evidence) tending to establish or rebut any specific fact involved in the case it is not error for the court to instruct the jury "that the court has ruled that there is some evidence in corroboration of the testimony of the prosecutrix in this case but the weight and sufficiency of that testimony is for the jury to determine" without indicating to the jury what evidence the court considered corroborative of the prosecutrix' testimony. *Ter. v. Fong Yee*, 309, 318.

2. *Evidence—corroboration.*

Whether in a given case there was any corroboration of the testimony of the prosecutrix is a question of law. *Ter. v. Fong Yee*, 309, 318.

3. *Evidence—letter written by defendant.*

When the prosecutrix in a seduction case produces letters which she claims to have received by mail from the defendant and testifies that she is familiar with defendant's handwriting and that said letters are in his handwriting, the letters are admissible in evidence without any further evidence to connect the defendant with the writing. *Ter. v. Fong Yee*, 309, 313.

4. *Evidence—letters written by defendant—corroboration.*

Letters identified only by prosecutrix may be considered as corroborative of her testimony on the issues requiring corroboration, since her testimony need be corroborated only as to the sexual intercourse and promise of marriage. *Ter. v. Fong Yee*, 309, 314.

5. *Evidence.*

In a case in which the defendant is charged with the crime of seduction it is not error to permit the prosecutrix to testify that she became pregnant as the result of the intercourse with the

SEDUCTION—Continued.

defendant and that she thereafter gave birth to a child, of which the defendant is the father. *Ter. v. Fong Yee*, 309, 312.

SET-OFF AND COUNTER-CLAIM.

1. *Reply not required.*

There is no provision in our statutes requiring a plaintiff to reply or otherwise plead to the allegations contained in a set-off interposed by a defendant. *Barnard v. Nobriga*, 303.

2. *Claim—judgment of default.*

Under our laws a judgment of default against a plaintiff for failure to plead to a set-off is not authorized. *Barnard v. Nobriga*, 303.

SHIPPING.

See CARRIERS.

SODOMY.

1. *What proof necessary.*

The morbid rule announced by some early day English and American courts to the effect that in a prosecution for sodomy emission must be proved, cannot be accepted as the true doctrine of the common law. *Ter. v. Chee Siu*, 814, 816.

SPECIFIC PERFORMANCE.

1. *Existing equities.*

One who purchases land with knowledge of a contract of sale thereon is bound by all of the equities enforceable against his grantor as a party to said contract. *Hurst v. Kukahi*, 194.

2. *When decreed.*

Specific performance will be decreed of a contract for the sale of land when there does not appear to have been any unfairness, injustice or inequality such as to require a court of equity to refuse its aid and the consideration is not grossly inadequate. *Hurst v. Kukahi*, 194.

3. *Decree in.*

Specific performance was decreed of a contract to convey 10.1 acres of land where respondent sought to comply with his contract by conveying only 4.1 acres, there being insufficient proof of fraud or mistake. *Jeffreys v. Konno*, 465.

STATUTES.

1. *Construction.*

So long as the language used is unambiguous a departure from its natural meaning is not justified by any consideration of its consequences, or of public policy; and it is the plain duty of the court to give it force and effect. *Estate of Castle*, 108, 118.

2. *Construction—contemporaneous construction.*

Contemporary construction and official usage for a long period by persons charged with the administration of the law are among the

STATUTES—Continued.

legitimate aids in the interpretation of statutes. *County of Hawaii v. Auditor*, 372, 377.

3. *Construction.*

Laws upon the same subject are construed with reference to each other. *Parke v. Parke*, 397, 403.

4. *Construction of statutes imposing taxes.*

It is the established rule not to extend the provisions of statutes imposing taxation by implication beyond the clear import of the language used or to enlarge their operation so as to embrace matters not specifically pointed out. In case of doubt they are construed most strongly against the government and in favor of the citizen. *Frear v. Wilder*, 603, 607.

5. *Construction of statutes imposing taxes.*

It is a cardinal rule of construction that statutes imposing taxes are to be construed strictly against the government and in favor of the taxpayer, and that no person and no property is to be included within their scope unless placed there by clear language. *Frear v. Wilder*, 603, 606.

6. *Sections 1305 and 1307 R. L. 1915 differentiated.*

Sections 1305 and 1307 R. L. 1915 were intended to serve separate and distinct purposes. The first levies an income tax upon the gains, profits and income derived from certain definite and plainly enumerated sources and fixes the rate of taxation, while the latter merely prescribes the method to be pursued by the taxpayer in returning his gross income from which his net taxable income is to be computed. *Frear v. Wilder*, 603, 607.

7. *Divorce statute.*

Section 2930 R. L. 1915 authorizing cross libels in divorce cases held to be valid and subsisting statute. *Springer v. Thompson*, 638.

8. *Title.*

Where a statute is included in a general compilation which is re-enacted by the legislature its prior status—so far as the question of whether its subject was embraced within its original title—is not material. *Springer v. Thompson*, 638, 641.

9. *Construction—meaning of language.*

It is a general rule that language used in a statute or constitution must be presumed to have been used in its known and ordinary significance unless that sense be repelled by the context. *Hollinger v. Kumalae*, 669, 686.

10. *Construction—meaning of phrase "office of the Territory of Hawaii"*

In its known and ordinary significance the phrase "office of the Territory of Hawaii" does not include offices purely local or municipal, but includes only such offices as were created for the

STATUTES—Continued.

purpose of carrying on the business of the territorial government.
Hollinger v. Kumalae, 669, 686.

11. *Construction—disqualification of citizen for election to office.*
Statutes providing for disqualification of citizens for election to office are construed strictly and will not be extended to cases not clearly within their scope. *Hollinger v. Kumalae*, 669, 686.

12. *Same subject matter—effect.*

When two statutes cover in whole or in part the same subject-matter and are not absolutely irreconcilable, no purpose of repeal being clearly shown, the court, if possible, will give effect to both.
Ter. v. Wills, 747, 757.

13. *Later enactments—effect.*

If a later statute does not cover the entire field of the first and fails to embrace within its terms a material portion of the first, it will not repeal so much of the first as is not included within its scope, but the two will be construed together so far as the first still stands. *Ter. v. Wills*, 747, 758.

STIPULATIONS.

See EVIDENCE, 4.

STREET RAILROADS.

See APPEAL AND ERROR, 16.

SUBROGATION.

See PRINCIPAL AND SURETY, 2.

TAXATION.

1. *Assessment.*

The mere fact that other property in the same vicinity and of the same description has been assessed for a larger or smaller sum is no ground to set aside an assessment. *Re Taxes Menefoglio*, 106, 107.

2. *Assessment—valuation.*

While the purchase price of property is not the sole basis of taxation it may, in cases, afford a very clear indication of the taxation value of the property. *Re Taxes Menefoglio*, 106.

3. *Inheritance tax—dower.*

The estate which a widow takes in the property of her deceased husband as her dower does not pass to her by virtue of the intestate laws and is not subject to the inheritance tax which is chargeable only upon property which shall pass by will or by the intestate laws of this Territory. *Estate of Castle*, 108, 117.

4. *Annuity.*

Where an estate is devised to trustees and such trustees are charged with the duty of paying out of such estate certain annuities, the annuities as such are not subject to the inheritance tax. *Estate of Castle*, 108, 120.

TAXATION—Continued.

5. *Charitable and educational trusts.*

A devise to trustees in order to be exempt from an inheritance tax as being for or to be devoted to a charitable or educational purpose must be by the terms of the will given up wholly to such charitable or educational purpose. *Estate of Castle*, 108, 120.

6. *Inheritance tax—exemptions and deductions—federal estate tax.*

The amount necessarily expended by an executor in payment of the federal estate tax constitutes an expense of the estate as much so as any expense of administration and can in no sense be said to have passed to the residuary legatee and is therefore to be deducted before computing the tax due upon such legacy. *Estate of Dillingham*, 129, 134.

7. *Enterprise for profit—growing crops.*

In estimating the value of growing crops of cane as personal property, which combined with other property constituted the basis of an enterprise for profit, it is proper to consider the quantity and price of the sugar which said crops are expected to yield. *Re Taxes Onomea Sugar Co.*, 278, 285.

8. *Full cash value.*

If property is not salable its value is what it would sell for if salable. *Re Taxes Onomea Sugar Co.*, 278, 284.

9. *Equalization of assessments.*

An assessment cannot be reduced on appeal merely because property in another division has been assessed lower in comparison—the assessor having acted in good faith and the assessment not being in fact an overvaluation of the property in question. *Re Taxes Onomea Sugar Co.*, 278, 283.

10. *Full cash value.*

Full cash value of a piece of property is what it would sell for when sold in the manner such property is usually sold. *Re Taxes Onomea Sugar Co.*, 278, 283.

11. *Enterprise for profit—growing crops.*

Under normal conditions when the price of sugar on January 1 might not be the price at which it would sell throughout the year it would be proper to consider the average price which could be expected over a period of years in estimating the value of the crop for that year, but where, as was the case on January 1, 1919, the price for that crop had been fixed, the fixed price should govern in making the estimate of the value of the crop as a separate item of property. *Re Taxes Onomea Sugar Co.*, 278, 287.

12. *Enterprise for profit—taxable assets—value.*

The net value of a piece of property is to be ascertained by allowing a proper amount for depreciation from year to year so that when the property is worn out and discarded the depreciations allowed will equal the original cost. The net value thus ascer-

TAXATION—Continued.

tained represents the true value for the purpose of taxation. *Re Taxes Onomea Sugar Co.*, 278, 290.

13. *Weight of decision of tax appeal court.*

A decision of the tax appeal court though not having the conclusiveness of a jury verdict should not be disturbed for light reasons. *Re Taxes Onomea Sugar Co.*, 278, 293.

14. *Value.*

The value of the whole will not be less than the aggregate value of the parts unless by reason of their combination the value of the parts has depreciated. *Re Taxes Onomea Sugar Co.*, 278, 286.

15. *Appeals—burden of proof.*

In a tax appeal case the burden is upon the appellant to show that the decision of the tax appeal court is erroneous. *Re Taxes Onomea Sugar Co.*, 278, 293.

16. *Corporation assets.*

In ascertaining the aggregate value of all the property owned by a corporation the amount of the debts, if any, of the corporation should be added to the selling price of the shares of its capital stock. *Re Taxes Onomea Sugar Co.*, 278, 298.

17. *Counties.*

A county is not entitled to the general property taxes collected upon property situated in said county during a given year even though the taxes collected were levied and assessed for a former year until the Territory has received and retained the full amount which it is authorized to retain under Sec. 1299 R. L. 1915 for the purposes specified in subdivision 5 of Sec. 1236 R. L. 1915 during the year in which the collection is made. *County of Hawaii v. Auditor*, 372.

18. *Sections 1305 and 1307 R. L. 1915 differentiated.*

Sections 1305 and 1307 R. L. 1915 were intended to serve separate and distinct purposes. The first levies an income tax upon the gains profits and income derived from certain definite and plainly enumerated sources and fixes the rate of taxation, while the latter merely prescribes the method to be pursued by the taxpayer in returning his gross income from which his net taxable income is to be computed. *Frear v. Wilder*, 603, 607.

19. *Assessable value of growing crops.*

In determining the value of growing crops of sugar cane for taxation purposes it is proper to take into consideration the prevailing market price of sugar. *Re Taxes Waiakea Mill*, 628.

20. *Assessable value of growing crops.*

But a price arbitrarily fixed by the assessor and not shown to exist cannot properly be used in estimating the value of the crops. *Re Taxes Waiakea Mill*, 628.

21. *Reduction from value of assets of corporation when ascertained by market price of its stock.*

In estimating for taxation purposes the value of the assets of a

TAXATION—Continued.

corporation forming an enterprise for profit, whose stock is quoted on the market, a small reduction is usually made from the total value of the assets of the company as indicated by the prevailing market price of the stock of the company on the assumption that it is too high because based upon the value of the shares of stock in small lots and that if the whole of the stock or large blocks thereof were put upon the market the price for that reason would be less than the market quotation. *In re Taxes American Factors*, 769, 771.

22. *Reduction from value of non-taxable assets.*

Where a reduction is allowed upon the total assets of the company in determining their value the same rate of reduction should likewise be allowed upon the non-taxable assets of the company. *Re Taxes American Factors*, 769, 772.

23. *Value of stock in other Hawaiian corporations owned by the enterprise.*

In order to ascertain the proper deductions to be made by reason of the shares of stock in other Hawaiian corporations owned by the enterprise the reasonable market value thereof should control instead of the par value or the book or so-called assessed value of the stock. *Re Taxes American Factors*, 769, 772.

24. *Stock held in foreign corporations—exempt from taxation when.*

Under section 1259 R. L. 1915 holders of shares of stock in corporations are not liable to be assessed in respect to their individual shares or interest in such companies, yet by the provisions of section 1257 R. L. 1915 the word "company" is held to mean only such corporations as are incorporated under the laws of the Territory and foreign corporations carrying on business in the Territory. *Re Taxes American Factors*, 769, 775.

See STATUTES, 4, 5; GIFTS, 1.

TENANCY IN COMMON.

1. *Hawaiian hui—shareholders are tenants in common.*

The members of a Hawaiian land hui are tenants in common of its lands in proportion to their respective ownership of shares. *Moranho v. de Aguiar*, 267, 270.

2. *Actions between cotenants—ouster.*

An answer filed in an ejectment suit between cotenants denying the plaintiff's title is a confession of ouster. *Moranho v. de Aguiar*, 271, 272.

3. *Conveyance of water right by one cotenant—easements.*

It is settled law that one cotenant may transfer his undivided interest or any aliquot part thereof to a third person and the modern rule is that one of the co-tenants may by metes and

TENANCY IN COMMON—Continued.

bounds convey a specific part of the common property by a deed valid between the grantor and grantee and avoidable by the non-assenting tenants in common to the extent only that the conveyance may impair or vary their rights. And the rule is the same whether the deed conveys the fee or an easement only. *Foster v. Waiahole Water Co.*, 726, 736.

4. *Conveyance of water right by one co-tenant.*

Where a co-tenant conveys his undivided interest in the water rights of the cotenancy the deed is valid as between the parties thereto and voidable by the non-assenting co-tenants to the extent only that they may show that the transfer is prejudicial to them. *Foster v. Waiahole Water Co.*, 726, 735.

See EJECTMENT, 2; HUIS, 1, 2.

TERMS OF COURT.

See JUDGMENT, 7.

TERRITORY.

1. *Fund from which payment is made not material.*

A payment by the Territory to one for whose benefit the legislature has made an appropriation, although not paid out of the fund contemplated by the appropriating act, will nevertheless be applied as a credit upon the amount appropriated when it appears that the payment was made on account of the claim for which the appropriation was made. *In re Koki*, 406.

2. *Limitation on legislative power.*

An appropriation of money by the legislature to pay to a defaulting homesteader any sum in excess of the value of his improvements as legally ascertained would amount to a gift or gratuity and is void. *In re Koki*, 406, 410.

See REAL ACTIONS, 3, 5; EJECTMENT, 2.

TORTS.

See NEGLIGENCE, 1.

TRIAL.

1. *Instructions.*

Where the court has given an instruction sufficiently covering the points covered by a requested instruction it is not error to refuse the same although in itself correct. *Ter. v. Marks*, 219, 222.

2. *Instructions—larceny—felonious intent.*

Under our statute defining larceny the felonious taking required is a taking with the intent to deprive the owner of the thing taken and to appropriate it to the use of the one taking and an instruction which authorizes a conviction, if the taking was with the mere intent to deprive the owner of the possession of the thing and without any intention of appropriating it to the use of the one taking, is error. *Ter. v. Marks*, 219.

TRIAL—Continued.

3. *Instructions—larceny—ownership.*

Where an indictment for larceny alleges ownership of the steer alleged to have been stolen in A it is necessary to prove that fact as alleged to authorize a conviction and an instruction which authorizes a conviction without proof of ownership as alleged is error. *Ter. v. Marks*, 219, 225.

4. *Conduct of trial—view and inspection.*

In the trial of a case, jury waived, involving the question of whether or not a covenant to repair and keep in a sanitary condition had been violated it appeared that the premises at the time of the trial were in practically the same state of repair and sanitary condition as they were when the forfeiture was declared, held not error for the trial judge to view and inspect the premises. *von Hamm-Young v. Hawaii Garage*, 253, 265.

4a. *Leading questions.*

Leading questions are permissible to arrive at facts when ignorance or modesty prevents a full answer to a general interrogatory. *Ter. v. Fong Yee*, 309, 312.

5. *Cross-examination.*

Where one is given wide latitude in an attempt to test the memory of a witness it is proper for the court to exercise a sound discretion in excluding further cross-examination for that purpose. *Akono v. Kaluai*, 392, 396.

6. *Nonsuit.*

To authorize the court to take the question from the jury the evidence must be of such a character that there is no room for ordinary minds to differ as to the conclusion to be drawn from it. *Makainai v. Lalakea*, 470, 476.

7. *Nonsuit.*

This court will not disturb the ruling of a circuit judge denying defendant's motion for a nonsuit at the close of plaintiff's evidence in rebuttal in a jury-waived trial if the evidence would have justified submitting the questions of fact to a jury. *Makainai v. Lalakea*, 470, 476.

8. *Instructions to jury.*

All instructions given to the jury must be read together and whatever may be lacking in one instruction may be supplied by another. *Wilson v. von Holt*, 529.

9. *Status of case remanded generally to a circuit judge at chambers.*

Upon a general remand to a circuit judge at chambers all issues of law and fact except such issues of law as were determined by the appellate court are again before the lower court for trial and determination. *Hoomana Naauao v. Makekau*, 593, 595.

10. *Status of case remanded generally to a circuit judge at chambers.*

Upon a general remand the cause is opened for the introduction

TRIAL—Continued.

by either side of any and all competent evidence which is pertinent to any of the issues raised by the pleadings. If the same judge who presided in the former trial also presides at the second trial the evidence received at the former trial would ordinarily still be in the mind of the judge or the transcript thereof available to him and it would therefore be unnecessary to have the evidence introduced at the second trial. *Hoomana Naauao v. Makekau*, 593, 595.

11. *Status of case remanded generally to a circuit judge at chambers.*

Should the trial judge at the second hearing deem it necessary or proper to have the evidence taken at the former hearing again adduced it should again be placed in the record. *Hoomana Naauao v. Makekau*, 593, 595.

12. *Status of case remanded generally to a circuit judge at chambers.*

But both parties should be permitted to introduce any other or further evidence touching any of the issues which they may elect to present. *Hoomana Naauao v. Makekau*, 593, 595.

13. *Verdict—correction of errors.*

Where the jury attempts to return a verdict for an amount greater than is justified by the undisputed evidence it is proper for the court to refuse to receive the verdict and instruct the jury to retire and correct its verdict so as to conform to the uncontradicted evidence to which he calls its attention. *Paxson v. Schuman Car. Co.*, 719, 725.

14. *Evidence—discretion of court.*

The discretion which the court exercises in regulating the order of receiving evidence is a judicial discretion and subject to review for abuse. *Ter. v. Kobayashi*, 762, 768.

15. *Nonsuit.*

The erroneous denial of a nonsuit for want of sufficient evidence is harmless error where after such denial the defect in plaintiff's proof is supplied by evidence introduced by either party. *Kaili v. I.-I. S. N. Co.*, 777, 781.

See APPEAL AND ERROR, 24, 31; CRIMINAL LAW, 2, 3, 4.

TROVER AND CONVERSION.

1. *Demand when necessary.*

In actions of trover the general rule recognized by all of the authorities is that where the original taking is lawful and there has been no illegal assumption of ownership or illegal user a demand and refusal must be shown as evidence of a disposition to convert to the holder's own use or to divest the true owner of his property. *Tsuru v. Bayer*, 693, 695.

TROVER AND CONVERSION—Continued.

2. *Demand when not necessary.*

Where the taking itself is wrongful or where there is an illegal assumption of ownership or an illegal user a demand and refusal need not be proved. *Tsuru v. Bayer*, 693, 696.

3. *Conversion defined.*

Any distinct act of dominion wrongfully exerted over one's property in denial of his right or inconsistent with it is a conversion. *Tsuru v. Bayer*, 693, 696.

4. *Trover and replevin distinguished.*

In the common law action of trover the plaintiff seeks solely the recovery of damages for the conversion of his property and the action is thus distinguishable from an action of replevin in which the primary relief sought is recovery of the specific property in question though by statute damages based on the value of the property, if its return cannot be obtained, may be recovered. *Tsuru v. Bayer*, 693, 697.

5. *Effect of return or offer to return property.*

As a general rule an offer to return property wrongfully converted is not admissible even in mitigation of damages, but where the conversion is technical, inadvertent or the result of a mistake and the property is still in *statu quo* an offer to return it may be shown in mitigation of damages. *Tsuru v. Bayer*, 693, 699.

6. *Measure of damages.*

In this class of cases the measure of damages ordinarily would be the fair reasonable value of the property at the time of the conversion. If the plaintiff has accepted the return of the property this would not bar an action for conversion but would mitigate the damages and fix the measure thereof at the reasonable value of the property at the time of the conversion less its value when returned. *Tsuru v. Bayer*, 693, 699.

TRUSTS.

1. *Attitude of trustees in controversy between real parties in interest.*

The trustees should occupy a neutral and indifferent attitude in any controversy between the real parties in interest and clearly they ought not to be allowed to litigate the claim of one such interested party as against another such party. *Castle v. Irwin*, 807, 811.

2. *Duty to protect estate.*

If the estate itself as an entity is attacked it would be the duty of the trustees to defend and if such defense requires that an appeal be prosecuted it would be their right and duty to prosecute the appeal. *Castle v. Irwin*, 807, 811.

3. *Duty to protect estate.*

So if the interests of the estate require the bringing of a suit such

TRUSTS—Continued.

suit should be brought by the trustees and in the event of an unfavorable judgment the trustees should appeal therefrom if such appeal would be proper to protect the interests of the estate. *Castle v. Irwin*, 807, 811.

4. *Duty to protect estate.*

With controversies which affect the individual interests alone of those who may be interested in their trust the trustees have nothing to do and consequently cannot be aggrieved by a decree which affects only those individual interests. *Castle v. Irwin*, 807, 811. See APPEAL AND ERROR, 37; TAXATION, 5.

VALUE.

See TAXATION, 2, 8, 10, 12, 14, 19, 20, 21, 22, 23.

VENDOR AND PURCHASER.

See CANCELLATION OF INSTRUMENTS, 1, 2.

VENUE.

See COURTS, 10, 11, 12, 13.

WAIVER.

1. *Principles governing.*

Waiver is a rule of judicial policy which prevents a person from taking inconsistent positions and gaining advantages thereby through the aid of courts even though the elements of estoppel and consideration are absent. *Scott v. Pilipo*, 386, 391.

Of trial by jury. See JURY, 1; see also ATTORNEY AND CLIENT, 3.

WAREHOUSEMEN.

1. *Lien of.*

The common law lien given to warehousemen does not extend to cases of private storage. *Damon v. Reliable Trans. Co.*, 98, 103.

WATERS AND WATERCOURSES.

1. *Surplus waters.*

Surplus waters of an ahupuaa belong to the konohiki and can be disposed of at will irrespective of the rights of other owners and tenants upon or within the ahupuaa. *Foster v. Waiahole Water Co.*, 726, 735.

See TENANCY IN COMMON, 3, 4.

WILLS.

1. *Construction.*

In construing a will the intention of the testator, when it can be ascertained, will be given effect. *McCandless v. Castle*, 22, 30.

2. *Construction.*

Where land is devised to a trustee to pay the income thereof to

WILLS—Continued.

testator's wife and children in equal shares during their lives and the life of the survivor of them, and upon the decease of any of the children, the share of the deceased child to go to his children, and upon the decease of any of the children without issue their share to go to the survivors and the issue of deceased children, the trustee being authorized to sell any of the trust estate and reinvest the proceeds, a grandchild of the testator took on the death of its parent a vested remainder in the income but only a contingent remainder in the corpus of the estate, contingent upon its surviving the last of testator's children. *McCandless v. Castle*, 22, 32.

3. *Probate of.*

The power of a probate court to set aside a decree admitting a will to probate is equal to that of a court of equity on a bill filed for relief against a judgment or decree for fraud or mistake. *Estate of Brown*, 70, 75.

4. *Probate—nature of decree.*

The probate of a will after notice as required by law is in the nature of a judgment in rem. *Estate of Brown*, 70, 74.

5. *Probate—revocation of probate.*

A decree admitting a will to probate can be set aside only upon sufficient cause shown, which involves both cause why the will should not be sustained and cause why the petitioner did not make a contest at the original hearing. *Estate of Brown*, 70.

6. *Probate—effect of failure to contest.*

An unfulfilled promise for the payment of money by the principal legatee under a will to one who refrained from contesting the probate of said will because of said promise does not amount to a fraud on the promisee and is not sufficient in itself to excuse the promisee for not having contested the probate at the original hearing. *Estate of Brown*, 70.

7. *Legacies.*

When a widow elects to take her dower instead of accepting the provisions of the will the general rule is that the legacies which were to have been effective at her death become immediately due, unless a contrary intention of the testator is shown. *Estate of Castle*, 108, 120.

8. *Testamentary capacity—presumption of law—burden of proof.*

The presumption of law is in favor of testamentary capacity and he who insists on the contrary has the burden of proof, except where insanity in the testator has been shown to exist at a time prior to the execution of the will in which event the proponent must show that it was executed at a lucid interval. *Estate of Lopez*, 197, 201.

WITNESSES.

See TRIAL, 4a, 5.

WORDS AND PHRASES.

1. *Accidental.*

The term "accidental" in its ordinary popular sense means a happening by chance or unexpectedly taking place, and not according to the ordinary course of things nor as expected. *Colburn v. U. S. F. & G. Co.*, 536, 539.

2. *Advances.*

The word "advances" in contracts has no such meaning that the court can determine the sense in which it is used by the parties without examining the contract as an entirety and seeking the aid of the surrounding circumstances and the practical construction of the contract by the parties themselves. *Sumitomo v. Hawaii Nohsan*, 691.

3. *Assessments of every description.*

The plain and legal meaning of the phrase "assessments of every description" contained in the lease includes every description of assessments for improvements classified as such by the governmental power imposing the obligation. *Estate Wilder v. I.-I. S. N. Co.*, 178, 180.

4. *Call.*

A call of a meeting in the legal sense of the term is a summons or notice to the parties entitled to meet directing them to do so. *Hoomana Naauao v. Makekau*, 418, 421.

5. *Compromise.*

"Compromise" has been defined as an agreement between two or more persons who, to avoid a lawsuit, amicably settle their differences upon such terms as they can agree upon. *First Bank of Hilo v. Maguire*, 43, 49.

6. *Conversion.*

Any distinct act of dominion wrongfully exerted over one's property in denial of his right or inconsistent with it is a conversion. *Tsuru v. Bayer*, 693, 696.

7. *Devoted.*

The commonly accepted meaning of the word "devoted" is "to give up wholly." *Estate of Castle*, 108, 118.

8. *Divorce.*

The term "divorce" in its accurate sense denotes dissolution or suspension by law of the marital relation. *Springer v. Thompson*, 638.

9. *Loafer.*

A loafer is one who loafs; a lazy lounge; one who has the bad habits of street loafers. *Kahanamoku v. Advertiser*, 701, 715.

10. *Movable effects.*

The term "movable effects in possession or reducible to posses-

WORDS AND PHRASES—Continued.

sion" is less comprehensive than the phrase "personal property." *Estate of Castle*, 38, 40.

11. *Office*.

An "office" is defined to be a public charge or employment and he who performs the duties of the office is an officer. *Ter. v. Wills*, 747, 751.

12. *Presumption*.

A presumption is an inference as to the existence of a fact not actually known arising from its usual connection with another which is known. *In re Kioloku*, 357, 364.

13. *Satisfactory cause*.

The phrase "satisfactory cause" as used in R. L. 1915, Sec. 2490, means that while there is a certain discretion vested in the probate judge the discretion thus vested is not personal but is a sound discretion to be regulated and exercised according to the rules of law. *Estate of Meyer*, 667, 668.

14. *Slacker*.

The term "slacker" was generally applied to a person who unlawfully evaded, or attempted to evade, his military duty. *Kahana-moku v. Advertiser*, 701, 716.

15. *Waiver*.

Waiver is a rule of judicial policy which prevents a person from taking inconsistent positions and gaining advantages thereby through the aid of courts even though the elements of estoppel and consideration are absent. *Scott v. Pilipo*, 386, 391.

WORDS AND PHRASES, HAWAIIAN.

1. *Konohiki*.

Konohiki, when used as a noun, designated the person having charge of the land in behalf of the king or chief or other person to whom the ahupuaa had been assigned or awarded, but the word "konohiki" is in common use as an adjective denoting land which is privately owned in contradistinction to "aupuni" or government land. *In re Kioloku*, 357, 360.

INDEX

CASES IN HAWAIIAN REPORTS APPROVED, CITED, DISTINGUISHED OR REVERSED

	Page
Achi, In Re, 8 Haw. 216.....	551, 576
Achi v. Kauwa, 5 Haw. 298.....	505
Ah Hoy v. Raymond, 19 Haw. 568, 573.....	696
Akatsuka v. McKay, 24 Haw. 600, 604.....	364
Alexander v. Fornander, 6 Haw. 322, 325.....	288
Alexandre, Estate of, 19 Haw. 551.....	41
Apokaa Sugar Co. v. Wilder, 21 Haw. 571.....	607
Atcherley v. Jarrett, 19 Haw. 511.....	491
Baker v. Brown, 18 Haw. 22.....	581
Banning, Estate of, 9 Haw. 453.....	123, 124, 126
Bell Tel. Co. v. Mutual Tel. Co., 5 Haw. 456, 460.....	377
Bierce v. Waterhouse, 19 Haw. 594.....	742
Bierce v. Waterhouse, 19 Haw. 598.....	595, 596
Bishop Estate, In Re Taxes, 13 Haw. 671.....	293
Boeynaems v. Ah Leong, 21 Haw. 699.....	590, 592
Bond v. Haw. Gazette Co., 22 Haw. 60.....	806
Brown, Estate of, 24 Haw. 443.....	110, 331
Brown, Estate of, 25 Haw. 327.....	792
Brown v. Davis, 21 Haw. 327, 329.....	273
Campbell, Estate of James, 16 Haw. 512.....	123, 124
Carter v. Carter, 10 Haw. 687, 694.....	115
Castle, Estate of, 25 Haw. 108.....	792
Castle, In Re Taxes, 15 Haw. 1.....	284
Castle v. Irwin, 25 Haw. 807.....	813
Catholic Mission, In Re Taxes, 22 Haw. 764.....	107, 283
Chilton v. Shaw, 13 Haw. 250.....	283
Ching On v. Amana, 6 Haw. 625.....	272
Colburn v. U. S. Fid. & G. Co., 25 Haw. 479.....	482
Cornwell v. Colburn, 15 Haw. 632.....	262
Correa v. Felipe, 24 Haw. 672.....	791
Crawford v. Stewart, 25 Haw. 226.....	300
Cummins, In Re, 20 Haw. 518-529.....	410
Davis, In Re, 15 Haw. 377.....	551
De Coito v. De Coito, 21 Haw. 339.....	276
De Souza v. Soares, 22 Haw. 17.....	33
do Rego v. Halama, 24 Haw. 750.....	366
Ena Estate, In Re Trustees, 18 Haw. 588.....	40
Gamaya, In Re, 25 Haw. 414.....	582

	Page
Gay & Robinson v. Assessor, 17 Haw. 227, 230.....	287, 630
Gear v. Henry, 21 Haw. 101.....	166, 167
Godfrey v. Rowland, 16 Haw. 377.....	397, 400, 401, 402, 405
Godfrey v. Rowland, 16 Haw. 505.....	402
Gomes v. Haw. Gazette Co., 10 Haw. 108, 111.....	716
Green v. Pope, 6 Haw. 235.....	195
Hackfeld v. Coerper, 18 Haw. 587.....	601
Halstead v. Pratt, 14 Haw. 38.....	608
Harris v. Cooper, 14 Haw. 145.....	11, 20, 21
Harris v. Judd, 3 Haw. 421.....	30
Harrison v. Davis, 22 Haw. 465, 466.....	250
Harrison v. Magoon, 16 Haw. 170.....	93
Harrison v. Magoon, 16 Haw. 175.....	645
Hart v. Hart, 23 Haw. 639.....	277
Hawn. Com. & S. Co. v. Wailuku Sug. Co., 15 Haw. 675.....	734
Hawn. Trust Co. v. Galbraith, 22 Haw. 78.....	790
Hawn. Trust Co. v. Holt, 24 Haw. 212.....	790, 792
Hawn. Trust Co. v. McMullen, 23 Haw. 685.....	176, 177
Higashi, Ex Parte, 17 Haw. 428, 441.....	431
Holiona v. Kamal, 24 Haw. 638.....	581
Holstein v. Benedict, 22 Haw. 441.....	476
Holt v. Lycurgus, 10 Haw. 72.....	305
Ho Tong v. Hope, 23 Haw. 603.....	504
Hoomana Naauao v. Makekau, 25 Haw. 418.....	594
Hoomana Naauao v. Makekau, 25 Haw. 593.....	744
Houghtailing v. De La Nux, 25 Haw. 438.....	500
Inter-Island S. N. Co. v. Shaw, 10 Haw. 640.....	107
Jarrett v. von Holt, 24 Haw. 419.....	331
Kaehu v. Namealoha, 20 Haw. 648, 653.....	272
Kahana, In Re Taxes Hui of, 21 Haw. 676, 678.....	720
Kaheana v. Nalimu, 8 Haw. 227.....	645
Kahoomana v. Min. of Int., 3 Haw. 635.....	367
Kalaniana'ole v. Dimond, 16 Haw. 153.....	166
Kaleiheana v. Keahipaka, 23 Haw. 169, 171.....	364
Kanakanui v. De Fries, 21 Haw. 123.....	262
Kanealii v. Hardy, 17 Haw. 1.....	9, 11, 20
Kaneohe Rice Mill v. Holi, 20 Haw. 609.....	273
Kauhane v. Kalu, 4 Haw. 144.....	272
Keahilihau v. King, 25 Haw. 139.....	171; 746
Keaho, Estate of, 17 Haw. 308.....	425
Kellipelapela v. Pamano, 1 Haw. 503-506.....	75
King v. Asegut, 3 Haw. 526.....	523
Kinney v. Oahu Sugar Co., 23 Haw. 747.....	565
Kioloku, In Re, 25 Haw. 170.....	746
Kuala v. Kuapahi, 15 Haw. 300.....	422
Kumalae v. Kalauokalani, 25 Haw. 1.....	38

	Page
Kunewa v. Kaanaana, 18 Haw. 252.....	367
Lau Lam v. Whitcomb, 21 Haw. 252.....	490
Lazarus v. Carter, 11 Haw. 541.....	725
Lewers & Cooke v. Fernandez, 23 Haw. 744.....	743
Lewers & Cooke v. Fernandez, 23 Haw. 746.....	217
Lewers & Cooke v. Wong Wong, 22 Haw. 766.....	96
Lewers & Cooke v. Wong Wong, 24 Haw. 39.....	96; 217
Lidgate v. Danford, 23 Haw. 317, 327.....	119
Lihue Plantation Co. v. Farley, 13 Haw. 283.....	293
Lucas v. Redward, 9 Haw. 23, 25.....	217
Luce v. Chin Wa, 5 Haw. 629.....	166
Lum Wai v. Hong Hoon, 24 Haw. 696, 705.....	504
Macfarlane v. Coll'r of Customs, 11 Haw. 166, 171.....	377
Magoon v. Lord-Young Co., 23 Haw. 187.....	183
Makahio v. Makahio, 22 Haw. 425.....	642
Makekau v. Kane, 20 Haw. 203.....	129
Maule v. Waihee Sug. Co., 4 Haw. 637.....	500
McBryde Sug. Co. v. Koloa Sug. Co., 19 Haw. 106, 116.....	625
McCandless v. Castle, 19 Haw. 515.....	28
McCandless v. Castle, 25 Haw. 22.....	93; 183
McCandless v. City & County, 24 Haw. 524.....	69; 180
Meheula v. Pioneer Mill Co., 17 Haw. 91.....	742
Mercer v. Kirkpatrick, 22 Haw. 644, 646.....	250
Mills v. Briggs, 4 Haw. 506, 507.....	75
Mills v. Walker, 18 Haw. 243.....	166
Minister of Int. v. Bishop & Co., 3 Haw. 793, 794.....	607
Minister of Int. v. Papaikou Sug. Co., 8 Haw. 125, 128.....	377
Minister of Int. v. Parke, 4 Haw. 366.....	367
Moir v. Knell, 17 Haw. 135.....	756, 758
Moranho v. De Aguiar, 25 Haw. 267.....	271
Nahaolelua v. Heen, 20 Haw. 372.....	567
Nahaolelua v. Heen, 20 Haw. 613.....	592
Nahinal v. Lai, 3 Haw. 317.....	272
Nobrega v. Nobrega, 13 Haw. 654.....	798, 800
Notley v. Brown, 17 Haw. 455, 458.....	95
Oahu Ry. & L. Co. v. Ass'r, 17 Haw. 163, 165.....	108, 293
Onomea Sug. Co., In Re Taxes, 25 Haw. 278, 287.....	630, 631
Onomea Sug. Co., In Re Taxes, 25 Haw. 293.....	774
Oopa, In Matter of Pet'n of, 3 Haw. 407.....	790
Orieumon, Ex Parte Fugihara, 13 Haw. 102.....	417
Orpheum Co. v. Dimond & Co., 14 Haw. 577.....	768
Pacheco v. Kalauokalani, 25 Haw. 1.....	38
Pahukula v. Maguire, 9 Haw. 630.....	578
Pasquoïn v. Sanders, 20 Haw. 352, 354.....	377
Paunau, In Re Boundaries of, 24 Haw. 546.....	362
Peacock v. Rothwell, 18 Haw. 464, 467.....	781

	Page
Peters v. Kaanaana, 10 Haw. 384, 386.....	273
Phillips v. Lum Chong Co., 14 Haw. 295.....	139
Republic v. Pahu, 10 Haw. 74.....	226
Republic v. Palea, 12 Haw. 159.....	818
Republic v. Waipa, 10 Haw. 442.....	395
Ripley & Davis v. Kap. Est., 22 Haw. 86.....	743
Ripley & Davis v. Kap. Est., 22 Haw. 507.....	718
Robinson v. Kaae, 22 Haw. 403.....	520
Rooke v. Queen's Hospital, 12 Haw. 375, 381.....	565, 567
Rose v. Parker, 4 Haw. 593.....	442, 500
Rosenbleddt, In Re, 24 Haw. 298.....	562
Sanderson v. Sanderson, 25 Haw. 172; 274.....	427
Scott v. Kona Dev. Co., 21 Haw. 258.....	490
Scott v. Pilipo, 23 Haw. 625.....	386, 387
Scott v. Pilipo, 24 Haw. 277, 283.....	736
Scott v. Pilipo, 24 Haw. 284.....	387
Scott v. Pilipo, 25 Haw. 386.....	622
Silveira v. Ahlo, 16 Haw. 702.....	733
Simerson v. Simerson, 20 Haw. 57.....	567
Sumner v. Jones, 22 Haw. 391.....	33
Tax Assmt. App., 11 Haw. 235, 236.....	282, 291, 293; 631
Tax Ass'r v. C. Brewer & Co., 15 Haw. 29, 35.....	298; 771, 775
Tax Ass'r v. Wailuku Sug. Co., 18 Haw. 423.....	291; 774
Tax Ass'r v. Wilder, 17 Haw. 425.....	293
Taylor v. City & County, 25 Haw. 58.....	180
Terr. v. Aki, 15 Haw. 63.....	700
Terr. v. Alcantara, 24 Haw. 197, 207.....	527
Terr. v. Capitan, 23 Haw. 771.....	314, 318
Terr. v. Chung Nung, 21 Haw. 214, 217.....	527
Terr. v. Fernandez, 24 Haw. 617.....	314
Terr. v. Furomori, 20 Haw. 344.....	819
Terr. v. Howell, 23 Haw. 797, 800.....	321, 325
Terr. v. Kap. Est., 20 Haw. 548.....	308
Terr. v. Masagi, 16 Haw. 196, 226, 227.....	527
Terr. v. Nishi, 24 Haw. 677, 683.....	318
Terr. v. Pupuhi, 24 Haw. 565.....	437; 587
Thurston v. Allen, 8 Haw. 392.....	30
Thurston v. Bishop, 7 Haw. 421.....	367
Tom Pong, In Re, 17 Haw. 566.....	641
Trust Co. v. Cabrinha, 24 Haw. 777.....	379
Union Mill Co., In Re Taxes, 23 Haw. 46.....	286
Vierra v. Ropert, 10 Haw. 301.....	500
Vierra v. Ropert, 10 Haw. 343-345.....	776
Vivas, In Re, 18 Haw. 670.....	546
Vivas v. Kauhimahu, 19 Haw. 463.....	798, 799, 800
Waiahole Water Co., In Re Taxes, 21 Haw. 679, 682.....	734

INDEX.

897

	Page
Waiakea Mill Co., In Re Taxes, 24 Haw. 333.....	286
Wallehua v. Lio, 5 Haw. 519.....	273
Wailuku Sug. Co. v. Cornwell, 10 Haw. 476, 479.....	625
Wall v. Focke, 22 Haw. 221, 223.....	595
Waterhouse v. Spreckels, 5 Haw. 246.....	708
Weinzheimer v. Kahalelio, 23 Haw. 374.....	74
Wilder v. Haw'n Tr. Co., 20 Haw. 589.....	608
Williams v. Castle, 19 Haw. 337.....	28
Wilson v. Lord-Young Eng. Co., 21 Haw. 87, 100.....	87
Wong Wong v. Skating Rink, 22 Haw. 92, 347, 413.....	740
Wong Wong v. Skating Rink, 22 Haw. 765.....	740
Wong Wong v. Skating Rink, 24 Haw. 39.....	740
Wong Wong v. Skating Rink, 24 Haw. 181.....	348
Wong Wong v. Skating Rink, 24 Haw. 92.....	349
Wong Wong v. Skating Rink, 25 Haw. 181.....	96
Wong Wong v. Skating Rink, 25 Haw. 347.....	563
Wong Wong v. Skating Rink, 25 Haw. 92, 347, 413.....	740
Wong Wong v. Skating Rink, 25 Haw. 347, 356.....	740
Yim Fat v. Gleason, 24 Haw. 210.....	717; 820
Yip Lan v. Ahuli, 23 Haw. 307, 311.....	503

STATUTES CITED, CONSTRUED, APPLIED, Etc.

UNITED STATES CONSTITUTION.

Amendment VI	430, 431
--------------------	----------

UNITED STATES STATUTES.

Section 1850.....	688
" 1854.....	687
" 1890.....	688

ORGANIC ACT.

Section 5.....	430, 431, 688
" 10.....	560, 561
" 16.....	671, 672, 685, 688
" 17.....	687, 689
" 34.....	689
" 40.....	689
" 45.....	640
" 55.....	337, 341
" 56.....	678, 687, 688
" 73.....	409
" 80.....	607

	Page
HAWAIIAN STATUTES.	
Stat. of Hawaii, 1842, Sec. 11, Ch. 10.....	403, 404
" " " , 1842, " 12, Ch. 10.....	404
Fundamental Laws of Haw. (see Laws 1842).....	403
Act of Nov. 7, 1846.....	655
Act of June 7, 1848.....	653
Act of Jan 3, 1865.....	658
Land Act of 1895.....	409
Frontage Tax Law (Ch. 112 R. L. 1915).....	632
Civil Code 1859, Sec. 1066.....	573
" " " " 1286.....	116
" " " " 1287.....	116
" " " " 1289.....	402
" " " " 1299.....	116
Civil Laws, Sec. 8.....	397
" " " 1870.....	397, 401, 402
" " " 1875.....	402
" " " 1938.....	798
S. L. 1870, Ch. VIII.....	182
" " 1907, Sec. 1-8, Act 97	340
" " 1911, Act 145.....	376
" " 1913, " 11.....	640
" " 1913, " 121.....	643
" " 1913, " 138.....	338, 345
" " 1915, " 7.....	640
" " 1915, " 50.....	585
" " 1915, " 105.....	599
" " 1915, " 117.....	608, 609, 610
" " 1915, Sec. 1, Act 117.....	609
" " 1915, Act 182	340
" " 1915, Sec. 3791E, Act 215	761
" " 1915, Act 221.....	751
" " 1917, " 150.....	585
" " 1917, " 215.....	82, 89, 90
" " 1917, " 222.....	280, 770
" " 1917, " 223.....	131
" " 1917, " 239.....	634
" " 1918, " 11.....	82
" " 1919, " 19.....	547, 551, 555
" " " " 44.....	364, 438, 442
" " " " 44, Sec. 4	763
" " " " 44, " 6	644
" " " " 45.....	786, 789, 807, 808, 809, 810
" " " " 62.....	757
" " " " 84.....	803
" " " " 177.....	373

INDEX.

899

	Page
S. L. 1919, Act 206, Sec. 1.....	609
" " " " 231, Sec. 2.....	407, 408
R. L. 1905, pages 1243-1245.....	655
" " 1915, Ch. 94.....	605, 609, 610
" " " " 117.....	747, 750
" " " " 167.....	642
" " " " 252.....	585
" " " Sec. 8.....	397, 402, 404
" " " " 414.....	406, 408
" " " " 427.....	409
" " " " 621.....	557
" " " " 628.....	803
" " " " 1041.....	445, 453
" " " " 1236.....	372, 373, 374, 375
" " " " 1240.....	280, 285
" " " " 1241.....	280, 284, 285, 770
" " " " 1254.....	288
" " " " 1257.....	769, 775
" " " " 1259.....	769, 775
" " " " 1299.....	372, 373, 374, 376
" " " " 1305.....	603, 605, 606, 608
" " " " 1307.....	603, 605, 606, 608
" " " " 1323.....	131, 609
" " " " 1324.....	114
" " " " 1406.....	77, 406
" " " " 1418.....	87
" " " " 1419.....	87
" " " " 1420.....	78, 83
" " " " 1442.....	756
" " " " 1559.....	756
" " " " 1654.....	685
" " " " 1667.....	688
" " " " 1668.....	689
" " " " 1686.....	8, 17
" " " " 1736.....	346
" " " " 1745.....	756, 757
" " " " 1751.....	757, 758
" " " " 1804.....	634
" " " " 1805.....	635
" " " " 1861.....	340
" " " " 1872.....	751, 758
" " " " 2214.....	381
" " " " 2234.....	333
" " " " 2236.....	799
" " " " 2252.....	428
" " " " 2260.....	308

				Page
R. L. 1915, Sec.	2272	.....		795
" "	" "	2297	.....	557
" "	" "	2331	.....	551, 570, 572
" "	" "	2337	.....	599
" "	" "	2360	.....	304
" "	" "	2361	.....	806
" "	" "	2369	.....	349
" "	" "	2371	.....	193, 777, 781
" "	" "	2379	.....	379
" "	" "	2385	.....	304
" "	" "	2390	.....	304
" "	" "	2392	.....	304
" "	" "	2435	.....	317
" "	" "	2472	.....	623, 625
" "	" "	2477	.....	425, 426
" "	" "	2490	.....	613, 616, 621
" "	" "	2508	.....	786, 792, 795, 805, 806
" "	" "	2513	.....	308
" "	" "	2514	.....	307, 308
" "	" "	2520	.....	56
" "	" "	2522	.....	364, 438, 442
" "	" "	2524	.....	763
" "	" "	2527	.....	137
" "	" "	2536	.....	138
" "	" "	2542	.....	123
" "	" "	2548	.....	182, 184
" "	" "	2628	.....	480
" "	" "	2630	.....	480
" "	" "	2651	.....	442
" "	" "	2659	.....	499, 502
" "	" "	2754	.....	494, 498, 499, 502
" "	" "	2797	.....	491
" "	" "	2863	.....	215, 216
" "	" "	2864	.....	215, 216, 218
" "	" "	2866	.....	217, 218
" "	" "	2867	.....	216, 352
" "	" "	2868	.....	353
" "	" "	2905	.....	397, 401, 402, 403, 404
" "	" "	2912	.....	395
" "	" "	2926	.....	642
" "	" "	2930	.....	638, 639, 640, 642, 643
" "	" "	2930-A	.....	640
" "	" "	2935	.....	274, 277, 793, 794
" "	" "	2944	.....	642
" "	" "	2977	.....	38, 40, 115
" "	" "	3118	.....	504

INDEX.

					Page
R.	L.	1915,	Sec.	3246	249
"	"	"	"	3258	201
"	"	"	"	3302	153
"	"	"	"	3451	161
"	"	"	"	3453	161
"	"	"	"	3501	650
"	"	"	"	3602	649
"	"	"	"	3833	818, 819
"	"	"	"	3894	415
"	"	"	"	3897	416
"	"	"	"	3918	223
"	"	"	"	3944	747, 749, 750
"	"	"	"	3998	416
"	"	"	"	4056	545
"	"	"	"	4100	584
"	"	"	"	4154	815

exced
7/5/21

7516 052

**ACME
BOOKBINDING CO., INC.**

OCT 2 7 1985

**100 CAMBRIDGE STREET
CHARLESTOWN, MASS.**